No. 11,688

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,
Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector of the Territory of Hawaii,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal pursuant to section 128 of the Judicial Code (28 U.S.C.A. 225) from a final decision and judgment of the Supreme Court of Hawaii (R. 186-190). Appellant contends that the Constitution and the Hawaiian Organic Act are involved (Complaint Par. VII, R. 5-8). The value in controversy, exclusive of interest and costs, exceeds $5000; appellant sued to recover taxes in excess of that amount, paid under protest, and recovered nothing. (R. 9, 101, 107.)

STATEMENT OF THE CASE.

Appellant's statement of the case ignores the decision and judgment of the trial court (R. 98-108), affirmed by the Supreme Court (R. 186-190). Appellant's statement consists largely of facts not found, because deemed by the lower court to be immaterial. Some of these facts, by reason of abandonment by appellant of assignments of error 2, 3, 4, 16, and 18 (R. 253-257) through failure to specify them in the brief (Br. 12-15)[1] incontrovertibly are immaterial.[2] As for

[1]The below schedule shows the extent to which the assignments of error have been preserved in the specification of errors.

Assignment of Errors (R. 253-258) No.	Specification of Errors (Br. 12-15) No.
1	1
2	Abandoned
3	Abandoned
4	Abandoned
5	2
6	3
7	4
8	5
9	6
10	7
11	8
12	9
13	10
14	12
15	11
16	Abandoned
17	13
18	Abandoned
19	14
20	15
21 (re specific exemption in the tax law)	Abandoned
21 (re power of the Legislature)	16
22	17

[2]Among the assignments of error abandoned are numbers 2, 3, 4 and 16, which sought to interpret the statute on the basis of, or give

appellant's statement that he filed gross income tax returns "in all respects as required by the General Excise Tax Law" (Br. 3) that of course is an issue of law in controversy; the statement above quoted is from appellant's complaint (R. 3).

Appellee herewith presents his own statement of the case.

This is a controversy between the appellant-taxpayer and the appellee-tax commissioner. Neither the United States nor any officer or representative of the post exchanges or ships' service stores has appeared in the controversy in any of its stages, as an amicus curiae or otherwise. During the period in question appellant correctly returned the amounts of his gross proceeds of sales but (1) claimed for certain of the gross proceeds so disclosed an exemption disallowed by the appellee-tax commissioner, and (2) as to part of the gross proceeds claimed to be exempt, reported the amounts on a line of the return form which would cause the applicable tax rate to be ¼ of 1%, if the exemption were disallowed; these amounts were reclassified by the appellee-tax commissioner as taxable at 1½%.

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other significance to, the change in administrative practice as of January 1, 1942, to wit (1) the determination that gross proceeds of sales to the United States, previously thought to be immune from taxation, were to be included in the measure of tax, and (2) the determination that post exchanges and ships' service stores, previously thought to be non-government business enterprises, were to be treated as arms of the federal government engaged in performing governmental functions as integral parts of the War and Navy Departments. Hence the fourth paragraph of appellant's statement of the case (Br. 3-4) has no bearing. Such change of administrative practice in any event is without significance. (Infra, footnote 15.)

Appellant's first claim, that of total exemption, was based on the theory that all sales to the United States were non-taxable (R. 22-23, 102; Ex. B, R. 27-36.) Appellant's second claim, that part of the amount in controversy should be classified as subject to the ¼ of 1% rate instead of the 1½% rate, was based on an attempted distinction between sales to the post exchanges and ships' service stores of the United States and other federal sales. (R. 22-23, 102; Ex. B, R. 27-36.)

It was stipulated (R. 24) and found (R. 103) that the post exchanges to which appellant sold were substantially similar to those involved in *Standard Oil Co. v. Johnson,* 316 U. S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611. Hence, these post exchanges are "arms of the federal government engaged in performing government functions as integral parts of the War Departments." (R. 106.) It further was stipulated and found that the ships' service stores have the same relation to the United States Navy as the post exchanges have to the United States Army. (R. 25, 103.) Nevertheless, appellant seeks to obtain for his sales to the post exchanges and ships' service stores a rate of tax lower than that admittedly applicable to other sales to the War and Navy Departments, if the claimed exemption is denied. (R. 22-23, 102; Ex. B, R. 27-36.)

The General Excise Tax Law of the Territory imposes a privilege tax against persons on account of their business and other activities in the Territory, measured by values, gross proceeds of sale, or gross income, as the case may be. (Sec. 2, Appendix.) The

tax falls on the business of a manufacturer, a farmer or other producer, a construction contractor, a theatre or other amusement business, services whether professional or otherwise, and every "business, trade, activity, occupation, or calling" not included in a specific provision of the Act. (Sec. 2, Appendix.) Included in the taxes levied by the statute is a tax upon the business of selling tangible personal property in the Territory measured by the gross proceeds of sales of the business. (Sec. 2 B, Appendix.) This tax, consonant with the all inclusive scheme of the statute, falls on every sale, and is not limited to sales at the retail level. The lower court found and decided (R. 98-107, 187, 202) that the tax law divides sales into two classes, viz.:

> *Class (1).* This class includes all sales to the territorial and federal governments and agencies thereof, charitable institutions, hospitals, fraternal benefit societies, public utilities, users and consumers, and others not themselves subject to the tax. This class includes all such sales irrespective of whether the goods are sold in wholesale lots or at wholesale prices, and irrespective of whether the goods are intended to be and are resold by the purchasers, or what is done with such goods. The evidence shows as examples of inclusion in this class irrespective of intended resale, sales to: School cafeterias of the Territory of Hawaii; public utilities selling stoves, refrigerators, heaters and the like but not subject to the general excise tax on such resales because of inclusion thereof in public utility business subject to public utility tax; hospitals and other tax exempt institutions; post exchanges and ships' service

stores. (R. 157-159, 160-163, 164-167.) In all such cases the second sale actually existed but was disregarded (R. 162-163), causing the single taxable sale to be treated as such, whether the reason was that no further sale would occur or that a further sale would not be taxable.

The rate of tax upon this class of sales throughout the period involved was 1½%.[3]

Class (2). This class includes only sales to: (a) a licensed retail merchant or jobber for purposes of resale; (b) a licensed manufacturer for incorporation into a product for sale; (c) a licensed contractor for incorporation into the project required by the contract. "Licensed", as used in the act, means and refers to a person subject to the privilege tax imposed by the act and required by the act to take out a license. (R. 106, pars. J and M; R. 198-200.) Hence, this class includes sales of goods which in normal distribution through commercial channels bear two taxes (viz., one when sold at wholesale when the rate is ¼ of 1% and one when sold at retail when the rate is 1½%). This class is distinguished from class (1) sales of goods which do not bear two taxes. The classification is *based upon this difference,* viz., whether double taxation (class 2) or single taxation (class 1) is involved.

The rate of tax upon class (2) sales throughout the period involved was ¼ of 1%.

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[3]Wherever the statute (Appendix) mentions 1¼% the rate of tax during the period in question was 1½%. The adjustment was made by the Governor pursuant to section 2, subsection III of the tax law. The 1947 tax rate has no bearing on this case.

Throughout the record, for convenience, the ¼ of 1% rate has been referred to as "wholesaling" and the 1½% rate as "retailing." Actually, as the lower court held, application of these rates does not depend upon determination of the common, ordinary sense of those words, the rate of 1½% being applicable unless appellant's sales meet the statutory requirements for class (2), which are found in section 1, subsection (10) (Appendix) under the statutory definition of "wholesaler." These statutory requirements, in so far as material in this case, are first, that appellant be "a person doing a regularly organized wholesale or jobbing business, known to the trade as such"; this the appellee-tax commissioner concedes that appellant is. Second, that the sales in question be "sales, to a licensed retail merchant or jobber, for purposes of resale"; this requirement the appellant contends was fulfilled; the appellee-tax commissioner contends it was not, and the lower court so held (R. 106, 198-201). Appellant further contends that the requirement that the sales be "to a licensed retail merchant or jobber" is unconstitutional and invalid as applied in this case, though he concedes the validity of the requirement that the sales be "for purposes of resale." Appellee-tax commissioner contends, and the lower court so held, that application of the requirement that the sales be "to a licensed retail merchant or jobber" is valid in this case as in others; moreover, that reading the statute as a whole, the above quoted words are part and parcel of the other admittedly valid requirement that the sales be "for purposes of resale."

QUESTIONS OF LAW INVOLVED.

1. Can the Territory of Hawaii lawfully include in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, the gross proceeds of sales so made to the United States and the post exchanges and ships' service stores which are integral parts thereof?

2. Can the Territory of Hawaii, in a privilege tax act which taxes every sale, service or other activity, avoid the undue pyramiding of the tax by prescribing a lower rate where a second taxable activity is to follow? If it does so, must it segregate and give consideration to an activity of the United States which, for taxation purposes, it is required to disregard?

STATUTES INVOLVED.

The General Excise Tax Law, as amended to and including the 1943 legislative session, is reproduced in the Appendix.

The period involved in this case is October 1, 1942 to and including March 31, 1944. Hence, the amendments made in 1943 were not in effect during the whole period; these 1943 amendments are set out in the Appendix in italics.

SUMMARY OF ARGUMENT.

(The below designation of points corresponds to that used in appellant's brief, pp. 15-16.)

A. The Territory of Hawaii lawfully can include in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, the gross proceeds of sales made to the United States, its post exchanges and ships' service stores.

1 and 2. The Territory of Hawaii was created by Congress as a sovereign government with full power to impose taxes. The Territory's power to tax the United States and its instrumentalities is as great as, and no greater than, the powers of the states with respect to such taxation.

3 and 4. The inclusion of gross proceeds of sales to the United States, its post exchanges and ships' service stores, in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, has only an economic effect upon the federal government, and does not constitute the tax an invalid burden upon or interference with federal activities. The *Panhandle* line of cases has been overruled.

B. The Territory of Hawaii lawfully can tax the gross proceeds of sales to post exchanges and ships' service stores at 1½%, the same as other sales to the federal and territorial governments, exempt institutions, and consumers.

1. The Supreme Court of Hawaii has interpreted the statute as classifying sales to post exchanges and ships' service stores with sales to the federal and territorial governments and others, where no second taxable activity occurs.

Such is not "manifest error"; indeed it is obviously correct.

2. The legislative classification was made to avoid undue pyramiding of the general excise tax; it consistently carries out this purpose without discrimination and is constitutional.

ARGUMENT.

A. THE TERRITORY OF HAWAII LAWFULLY CAN INCLUDE IN THE MEASURE OF A PRIVILEGE TAX UPON THE BUSINESS OF SELLING TANGIBLE PERSONAL PROPERTY IN THE TERRITORY, THE GROSS PROCEEDS OF SALES MADE TO THE UNITED STATES, ITS POST EXCHANGES AND SHIPS' SERVICE STORES.

1 and 2. The Territory of Hawaii was created by Congress as a sovereign government with full power to impose taxes. The Territory's power to tax the United States and its instrumentalities is as great as, and no greater than, the powers of the States with respect to such taxation.

That the Territory of Hawaii was created by Congress as a sovereign government was held in *Kawananakoa v. Polyblank,* 205 U.S. 349, 27 S. Ct. 526, 51 L. Ed. 834. Both this court and other courts having appellate jurisdiction over territories repeatedly have supported the taxing power of the territories. It is "the full taxing power" which Congress itself could have exercised. *Yerian v. Territory of Hawaii,* 130 F. 2d 786, 788 (C.C.A. 9th 1942) and cases cited; *Rivera v. Buscaglia,* 146 F. 2d 461 (C.C.A. 1st 1944); *Haavik v. Alaska Packers Assn.,* 263 U.S. 510, 513.

With respect to claims of federal immunity, this court has held that the rules governing the power to tax are the same as govern the states, and that the overruling of the doctrine of the tax immunity of those dealing with the federal government is as effective in the Territory of Hawaii as elsewhere. "* * * the power conferred by #55 [of the Hawaiian Organic Act] is as great as, and no greater than, the powers of the States with respect to such taxation." *Yerian v. Territory,* supra, and cases cited.[4]

There remains to be considered the contention that "the power that is given them [the territories] by Congress depends upon what Congress thought it was granting at the time of the enactment of the power granting act." (Br. pp. 22-23.) The answer above made is: Congress thought it was granting the Territory of Hawaii the same power as a state. *Yerian v. Territory,* supra. Because Congress so intended the distinction made elsewhere in appellant's brief (Br. 39-42) between states and territories based on the duality of sovereignty where the states and the federal government are concerned, is of no materiality. Indeed, the Supreme Court of the United States has suggested that the duality of sovereignty requires

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[4]130 F.2d 786, 789. To the same effect as the *Yerian* case and cases there cited, are *Rivera v. Buscaglia,* supra; *Gromer v. Standard Dredging Co.*, 224 U.S. 362, 371, 32 S.Ct. 499, 56 L.Ed. 801. While it is not to be presumed that Congress intends a territory to possess more taxing power than a state, a territory by specific authority of Congress may even possess taxing power denied to a state. *Inter-Island Co. v. Hawaii,* 305 U.S. 306, 59 S.Ct. 202, 83 L.Ed. 189; *Buscaglia v. Ballester Hermanos,* 162 F.2d 805 (C.C.A. 1st 1947), cert. den. ..... U.S. ....., ... S.Ct. ....., 92 L.Ed.Adv.Sh. 78.

greater *judicial* protection of the federal government against state taxation than in the case of territorial taxation where *congressional* protection can be invoked. *Talbott v. Silver Bow County,* 139 U.S. 438, 445-446, 11 S. Ct. 594, 35 L. Ed. 210.

The citation in appellant's brief (Br. pp. 23-25, 27) of certain cases in which statutes have been interpreted in their historical setting, implies a further contention, not directly made, that the judicial decisions of 1900, the date of enactment of the Hawaiian Organic Act, should be read into that Act.

In the first place, the contention is one which if meritorious would have led to a different result in the *Yerian* case. That case involved a tax on a federal salary, which prior to 1900 had been held to fall under the blanket of federal immunity.[5] The earlier cases were overruled by *Graves v. People of New York ex rel O'Keefe,*[6] and this court perceived no necessity that the Hawaii Organic Act be amended, in order to give that case effect.

In the second place, the contention now under consideration, actually present but not specifically argued in the *Yerian* case, was fully presented and summarily denied in a similar case arising in Puerto Rico in which the taxpayer sought to freeze into the Organic Act the doctrine of *Collector v. Day.*[7] This similar case is *Rivera v. Buscaglia,* supra.[8]

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[5]*Dobbins v. Commissioners,* 16 Pet. 435, 10 L.Ed. 1022 (1842); *Collector v. Day,* 11 Wall. 113, 20 L.Ed. 122 (1870).
[6]306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927.
[7]Supra, footnote 5.
[8]146 F.2d 461, 462 (C.C.A. 1st 1944).

In the third place, the contention is one which in this case arrives nowhere. Appellant relies on the *Panhandle* line of cases (Br. 17-18, notes 4-6), which *originated in 1928,* and which the Supreme Court commenced to "limit" in 1937,[9] and finally overruled in 1941.[10] At the time of the Hawaiian Organic Act *Tabott v. Board of Commissioners of Silver Bow County,* supra,[11] was the law, holding that the presumed intent of Congress is to confer on the territories as great a taxing power with respect to federal instrumentalities as the states'.

In the fourth place, the general rule is that a grant of taxing power is presumed to be complete, and to carry with it without further enactment, all enlargements thereof by judicial decision or congressional legislation. *Philadelphia v. Schaller,* 148 Pa. Super. 276, 25 A. 2d 406, cert. den. 317 U.S. 649, 63 S. Ct. 43, 87 L. Ed. 522 (1942); *Kiker v. Philadelphia,* 346 Pa. 624, 31 A. 2d 289, cert. den. 320 U.S. 741, 64 S. Ct. 41, 88 L. Ed. 439; *Boeing Aircraft Co. v. R. F. C.,* 25 Wash. 2d 652, 171 P. 2d 838 (1946). Construing an act of Congress which could have required immunity from state taxation but did not do so, enacted at a time when such tax immunity existed by judicial decision, the Supreme Court of the United States said:

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[9]*James v. Dravo Contracting Co.,* 302 U.S. 134, 151, 58 S.Ct. 208, 217, 82 L.Ed. 155, 168.

[10]*Alabama v. King & Boozer,* 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3; *Curry v. United States,* 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9.

[11]139 U.S. 438, 11 S.Ct. 594, 35 L.Ed. 210 (1891).

> "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication."
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> *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 604, 63 S. Ct. 1284, 1286, 87 L. Ed. 1612, 1617 (1943).

In the fifth place, the cases cited in appellant's brief turn on a particular legislative history showing a specific intent to freeze into the statute in question the prevailing law. These cases have been so distinguishd.[12]

In the sixth place, the tax here involved, unlike the tax in *Helvering v. Griffiths*[13] cited by appellant (Br. 27-28), concerns the period *after* the new constitutional doctrine was inaugurated. That taxpayers should be entitled to rely on constitutional law cases as they stand at the time of the accrual of the tax is a proposition not controverted by the actions of the tax commissioner in this case.

Appellant's brief makes passing mention of the fact that the Territory did not attempt to tax the proceeds of sales to the United States until January 1, 1942 (Br. 21-22). In the lower court this was urged as having bearing on the construction of section 3 of the general excise tax law, but the assignments of error which would raise this point have been aban-

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[12] *United States v. South-Eastern Underwriters' Association*, 322 U.S. 533, 556-8, 64 S.Ct. 1162, 1175-76, 88 L.Ed. 1440, 1459-60;
Commisioner v. Shamberg Estate, 144 F.2d 998, 1003 (C.C.A. 2d 1944), cert. den. 323 U.S. 792, 65 S.Ct. 433, 89 L.Ed. 631.

[13] 318 U.S. 371, 63 S.Ct. 636, 87 L.Ed. 843.

doned.[14] If appellant's brief intends to suggest that a new legislative enactment by the tax levying authority is necessary to take advantage of the narrowing of federal immunity (whether by judicial decision or congressional legislation), the point clearly is erroneous.[15]

3 and 4. The inclusion of gross proceeds of sales to the United States, its post exchanges and ships' service stores, in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, has only an economic effect upon the Federal Government, and does not constitute the tax an invalid burden upon or interference with Federal activities. The Panhandle line of cases has been overruled.

Appellant's brief takes the position that the *Panhandle* line of cases has not been overruled (Br. pp. 28-39). This issue no longer is an open one. In *Alabama v. King and Boozer,* supra,[16] the Supreme Court said that the federal immunity doctrine:

> "* * * does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as

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[14]Those assignments were 3, 4, and 2.

[15]*Cook v. Wilson,* 83 Ark. 938, 187 S.W.2d 7 (1945), aff'd sub. nom. *Wilson v. Cook,* 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793;
Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731 (1938);
Compress of Union v. Stone, 188 Miss. 49, 193 So. 329 (1940), cert. den. 311 U.S. 668, 61 S.Ct. 27, 85 L.Ed. 429;
Great Atlantic & Pacific Tea Co. v. City of Richmond, 183 Va. 931, 33 S.E.2d 795 (1945);
Duhame v. State Tax Commission, ... Ariz. ....., 179 P.2d 252 (1947).

[16]314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3.

> a different view has prevailed, see *Panhandle Oil Co. v. Knox,* supra; *Graves v. Texas Co.,* supra, we think it no longer tenable."
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> p. 9.

The headnote of this case reads:

> "(1) The fact that the economic burden of the tax is passed on to the United States does not make it a tax upon the United States. *Panhandle Oil Co. v. Knox,* 277 U.S. 218, and *Graves v. Texas Co.,* 298 U.S. 393, overruled. p. 9."
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> p. 1.

In the later case of *Penn Dairies v. Milk Control Commission,* 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943) the Supreme Court itself said that it had overruled the *Panhandle* line of cases in the *King and Boozer* case. The court said of certain early opinions of the Comptroller General:

> "* * * All rest on the reasoning of *Panhandle Oil Co. v. Knox,* 277 U.S. 218, and like cases, which were overruled in *Alabama v. King & Boozer, supra.* * * *"
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> p. 277.

The trial court held (R. 104-105) following the previous opinion of the Supreme Court of Hawaii (R. 193-195), and the Supreme Court affirmed the trial court (R. 187), that the tax in question is a tax upon the business of selling tangible personal property in the Territory, measured by the gross proceeds of sales of the business, including all sales made to the United States government, its departments and agencies; that the tax so imposed is a tax upon the

plaintiff-appellant and does not levy a burden upon or interfere with federal activities; and that such tax has only an indirect economic effect upon the United States government, its departments, and agencies.

That the tax act is of the nature so set forth is clear from its provisions (Appendix). Nowhere in the tax act is the vendor required to collect the tax from the purchaser, or the purchaser made liable therefor. The question before this court is the duty of Thomas H. Brodhead, doing business as T. H. Brodhead Co., to pay the tax.[17]

It is noteworthy[18] that the United States, to whom the tax immunity is supposed by appellant to belong, does not claim it. The obvious reason for the non-appearance of the United States in this proceeding is that the Attorney General advised the War Department to "take no part in any effort to prevent the collection of the tax[19] from dealers domiciled in the Territory [of Hawaii] on sales made by them to such post exchanges". 39 Ops. Atty. Gen. 316 (1939). And the Comptroller General has disclaimed interest in the collection of a tax of the type here involved from a vendor selling supplies to the United States, saying:

> "* * * the language used by the Supreme Court of the United States in its decision in the case of

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[17]Compare *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65, where the question before the court was the duty of the federal instrumentality-purchaser to pay a tax construed by the state court as a sales tax laid upon the purchaser.

[18]*James v. Dravo Contracting Co.*, supra, 302 U.S. 134, 158, 58 S.Ct. 208, 82 L.Ed. 155.

[19]The tax there involved was the Hawaiian Tobacco Tax, imposed by Act 220 of the Session Laws of Hawaii 1939.

> *Alabama v. King & Boozer,* 314 U.S. 1. leaves no room for doubt that a person who sells supplies to the United States is not—merely because of the immunity of the Federal Government from State taxation—exempt from the payment of an otherwise applicable State tax where it appears that the legal incidence of the tax rests upon him as the vendor and not upon the United States as the vendee. * * *."
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> 24 Comp. Gen. Dec. 150, 152.[20]

The interest sometimes taken by the United States in the collection of a tax on sales to it has been coupled with the admission that the tax was valid if imposed on the vendor, the United States being concerned only if, under the particular tax law, the legal incidence of the tax fell on the purchaser. *United States v. Lee,* 153 Fla. 94, 13 S. 2d 919 (1943).[21]

This distinction between a tax such as the general excise tax here involved, and a true sales tax required to be added to the price and collected from the vendee *qua* tax, has been deemed important by law writers on the subject. Thus, as late as July 1945 Professor Powell, while having no doubt that the *Panhandle* line of cases had been overruled as to a tax of the first type imposed solely on the vendor,[22] thought

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[20]The Comptroller General had rendered a similar opinion as early as 1938. 17 Comp.Gen.Dec. 863.

[21]In this case the United States was represented by *Samuel O. Clark, Jr.,* then the head of the tax division of the Department of Justice.

[22]At page 789 of 58 Harv.L.R. Professor Powell says: "The new light now is that the United States should pay its way if it pays it merely through increase of charges by contractors *and vendors* or through possible higher salaries." (Italics added.)

that this line of cases had not yet been overruled as to a tax of the latter type, when applied to a sale to the United States.[23]

Even this remaining doubt has been put at rest. In *Wilson v. Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793 (1946),[24] there was involved an Arkansas statute which imposed "a privilege or license tax * * * upon each person * * * engaged in the business of * * * severing from the soil * * * for commercial purposes natural resources, including * * * timber * * *". The tax was at the rate of seven cents per thousand feet of timber severed. The taxpayer was required to "*collect or withhold out of the proceeds*[25] of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance".

The United States, as owner of timberland, made a contract with Wilson Lumber Company for the purchase and severance of timber on national forest reserves. Title to the timber was to remain in the United States until it was paid for.

Wilson Lumber Company having been assessed for the tax, sued to enjoin its collection. The Supreme Court of Arkansas held that the tax assessed against Wilson Company did not lay an unconstitutional

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[23]"*The Waning of Intergovernmental Tax Immunities*", 58 Harv.L.R. 633, 657; "*The Remnant of Intergovernmental Tax Immunities*", 58 Harv.L.R. 757, 763.

[24]This case was decided on the very day that the Supreme Court of Hawaii rendered its opinion (R. 191).

[25]Italics added.

burden on the United States. The Supreme Court of the United States granted certiorari.

Wilson Company contended among other points that "the tax is unconstitutional as a tax laid upon the property or activities of the United States, or because the tax laid on plaintiffs [Wilson Lumber Company] imposed an unconstitutional burden on the United States".

The contention that the mere laying of the tax on Wilson Lumber Company measured by the amount of timber purchased by it from the United States constituted an unconstitutional burden on the United States, was summarily denied, the court saying:

> "Our decision in *James v. Dravo Contracting Co., supra,* and in *Alabama v. King & Boozer, supra,* and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefits of the implied constitutional immunity of the Federal Government from taxation by the state."
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> pp. 482-483.

Thus, with respect to the type of tax here involved, imposed on one dealing with the United States for the privilege of so doing, the validity thereof is beyond doubt; it is characterized by the Supreme Court of the United States as having been placed beyond doubt by the decisions in the *Dravo Contracting Company* and *King and Boozer* cases.

There was involved in the *Wilson* case the further question of the effect of the requirement, not present in the Hawaii statute, that the tax be passed on to the United States; the severer of the timber was required to withhold the tax from the proceeds of the sale of the products severed. This type of tax, as above noted, was the only type of tax theretofore resisted by the United States, and it filed a brief as amicus curiae in this case. It was contended that by reason of this feature of the law it placed "a forbidden tax directly on the United States" and comparison was made with *Mayo v. United States,* 319 U.S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504.

The Supreme Court confined its decision to the case before it as framed in the state court, that is, the collectibility of the tax from Wilson Company; the court did not decide whether or not that company could collect the tax from the United States. It was too late to raise that question, the court said.

Considering the effect of the collection provision on Wilson Company, the court held that this feature of the law did not bring Wilson Company within the protection of the federal immunity doctrine. The line of division between a tax on one dealing with the United States and a tax on the United States could not be made clearer than it is made in this case. Said the court,

> "We obviously do not by our judgment against the plaintiffs [Wilson Company] impose the tax on the Government."
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> pp. 484-485.

Upon comparison of the dissenting opinion of Mr. Rutledge with the majority opinion, an even greater significance of the decision appears. This will be developed in Part B of this brief.

By reason of the number and decisive character of the authorities involving dealings with the United States, resort to cases involving interstate and foreign commerce is uncalled for. We therefore have refrained from analyzing the cases in this field cited by appellant[26] or adding others of that nature.

The authorities upon which appellee-tax commissioner relies, all involving dealings with the United States, are presented in chronological order commencing with the *Dravo Contracting Company* case, as follows:

James v. Dravo Contracting Co., supra, 302 U.S. 134, 149, 58 S. Ct. 208, 82 L. Ed. 155 (1937). A privilege tax on a contractor having a lump sum contract with the United States, measured by the gross proceeds of his contract, is valid.

Western Lithograph Co. v. State Bd. of Equalization, supra, 11 Cal. 2d 156, 78 P. 2d 731 (1938). A sales tax on a vendor to a national bank, measured by the gross proceeds of sale, and authorized but not required to be separately stated in the charge to the vendee, is valid.

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[26](Br. 37-38.) The General Excise Tax Law of the Territory of Hawaii definitely was not modeled after the Indiana Gross Income Tax Law as claimed in appellant's brief (Br. 37). It is of the type exemplified by the West Virginia Law (West Va. Code of 1943, c. 11, art. 13).

Federal Land Bank v. De Rochford, 69 N. D. 382, 287 N. W. 522 (1939). A tax on a sale of motor vehicle fuel to a federal land bank is valid.

Compress of Union v. Stone, supra, 188 Miss. 49, 193 So. 329 (1940). A gross income tax applied to receipts from compressing of cotton for Commodity Credit Corporation, a wholly owned federal instrumentality, is valid.

Alabama v. King & Boozer, supra, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3 (1941). A sales tax the incidence of which is on the vendee, to whom it is passed on, imposed on a federal cost-plus contractor purchasing lumber for delivery to the construction site where, according to the government contract, title passes to the United States and the United States becomes obligated to reimburse the contractor, is valid.

Curry v. United States, supra, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9 (1941). A use tax imposed on a federal cost-plus contractor importing roofing from without the state, on account of his use of the roofing in the performance of a federal contract under an agreement for reimbursement by the United States, is valid.

Federal Land Bank v. Bismarck Co., supra, 314 U.S. 95, 62 S. Ct. 1, 86 L. Ed. 65 (1941). A sales tax the incidence of which is on the vendee, to whom it is required to be passed on, when imposed on a purchase by a federal land bank cannot be collected from that bank.

Penn Dairies v. Milk Control Commission, supra, 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (March, 1943). A requirement that a vendor of milk shall charge a minimum price therefor, is valid as applied to the sale of milk to the United States.

United States v. Lee, supra, 153 Fla. 94, 13 S. 2d 919 (June 1943). A tax on the privilege of selling gasoline the incidence of which is on the vendor, applied to a sale to the United States, is valid.

Mayo v. United States,[27] supra, 319 U. S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504 (June 1943). (Br. 35.) An inspection fee imposed on importations of commercial fertilizer into Florida cannot be exacted for commercial fertilizer owned by the United States and brought into Florida by it for distribution under the Soil Conservation and Domestic Allotment Act.

United States v. Allegheny County[28] *(Mesta Machine Co.* case), 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944). (Br. 36, 38.) An *ad valorem* property tax assessed upon the land and plant of Mesta Machine Company, including in the measure of the tax the value of equipment owned by the United States without limitation to the value of the company's own interest therein as the lessee of the United States, is invalid.

Smith v. Davis, 323 U. S. 111, 65 S. Ct. 157, 89 L. Ed. 107 (1944). An *ad valorem* tax on an open ac-

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[27]This case will be further considered in Part B of this brief.
[28]This case will be further considered in Part B of this brief.

count receivable for money due from the United States, arising out of a construction contract is valid.

Carnegie-Illinois Steel Corp. v. Alderson, 127 W. Va. 807, 34 S. E. 2d 737 (1945), cert. den. 326 U. S. 764, 66 S. Ct. 146, 90 L. Ed. 460. A steel company occupying, as lessee, an ordinance plant owned by the United States, under an agreement requiring it to sell the entire output to the United States at fixed prices, is liable for the West Virginia tax on the privilege of manufacturing, measured by the gross proceeds of sale of the product to the United States.

Wilson v. Cook,[29] supra, 327 U. S. 474, 66 S. Ct. 663, 90 L. Ed. 793 (1946). A company purchasing and severing timber from United States owned land is liable for a tax on the privilege of engaging in such business, measured by the volume of timber cut.

S.R.A., Inc. v. Minnesota,[30] 327 U. S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946). An abandoned post office site sold by the United States as surplus real estate under a contract entitling the purchaser to possession but retaining legal title in the United States for security purposes, may be assessed to the purchaser at its full value even though he still owes a substantial part of the purchase price, where the assessment is made subject to the fee title of the United States and no lien is claimed on the United States title.

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[29]This case will be further considered in Part B of this brief.
[30]This case will be further considered in Part B of this brief.

R.F.C. v. Beaver County, 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172 (1946). In consenting to taxation of "real property" of the United States, Congress intended that there might be included therein whatever by state law was deemed real property, e.g., machinery included by Pennsylvania in the assessment of a manufactory.

Sanders v. Oklahoma Tax Commission, 197 Okla. 285, 169 P. 2d 748 (1946), cert. den. 329 U. S. 780, 67 S. Ct. 202, 91 L. Ed. Adv. Sh. 80. A federal contractor using gasoline in tractors and other machinery for the performance of his construction contract with the United States, is liable to a state tax upon such use notwithstanding the fact that by reason of the state's cession of exclusive jurisdiction of the federal area where the use occurs, the state is dependent upon congressional authorization for the tax, and Congress has only consented "when such fuels are not for the exclusive use of the United States".

Kaiser Co. v. Reid,[31] 30 Cal. Adv. 614, 184 P. 2d 879 (1947). A nontransferable exclusive use of shipyards and facilities owned by the United States is a possessory interest taxable to the occupant upon the value of the possessory interest, even though it is operating the yard as a cost-plus contractor, its agreement will require the United States to pay the tax, and the United States intervenes in the case to protest the tax.

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[31]This case will be further considered in Part B of this brief.

Jefferson County v. United States, 164 F. 2d 184 (C.C.A. 5th, 1947). Land bought by the United States with funds transferred to it by the Florida Rural Rehabilitation Corporation and subsequently resold to individual purchasers is not subject to tax prior to the sale, irrespective of the use made of the land.

Salt Lake County v. Kennecott Copper Corp., 163 F. 2d 484 (C.C.A. 10th, 1947), cert. den. ..... U. S. ....., ... S. Ct. ....., 92 L. Ed. Adv. Op. 400, Feb. 9, 1948. Where a Utah statute, as interpreted by the Utah Supreme Court, which interpretation is followed, requires that mines (in addition to the improvements and machinery thereof) be assessed at $5 per acre plus twice the gross proceeds realized during the preceding calendar year from the sale or conversion of ores into money (called the "net annual proceeds"), and that there be included in these proceeds a subsidy paid by the United States per pound for minerals produced in excess of fixed quotas, inclusion of the subsidy does not invalidate the tax.

B. THE TERRITORY OF HAWAII LAWFULLY CAN TAX THE GROSS PROCEEDS OF SALES TO POST EXCHANGES AND SHIPS' SERVICE STORES AT 1½%, THE SAME AS OTHER SALES TO THE FEDERAL AND TERRITORIAL GOVERNMENTS, EXEMPT INSTITUTIONS, AND CONSUMERS.

1. **The Supreme Court of Hawaii has interpreted the statute as classifying sales to post exchanges and ships' service stores with sales to the Federal and Territorial Governments and others, where no second taxable activity occurs. Such is not "manifest error"; indeed it is obviously correct.**

This point involves the interpretation of the tax act. Counsel for appellant concedes the well settled rule that the construction of a statute by the Supreme Court of Hawaii is to be accepted by this Court unless manifestly erroneous (Br. 45).[32]

Appellant's difference with the Supreme Court of Hawaii in the matter of interpretation carries over into appellant's argument as to the validity of the rate provisions. That is to say, appellant having set up the classification of taxpayers as he sees it persists in using this same classification in point 2 of part B of his brief, where discrimination is asserted. Obviously, to apply the interpretation of the Supreme Court of Hawaii, we must apply not only the tax rate it found due, but the classification it made for rate purposes, and the legislative intent found to call

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[32]Citing *Waialua Agricultural Co. v. Christian,* 305 U.S. 91, 59 S.Ct. 21, 83 L.Ed. 60, reh'g den. 305 U.S. 673, 59 S.Ct. 240, 83 L.Ed. 436. Cases in this court involving the interpretation of tax statutes and so holding, are *Hawaii Consolidated Ry v. Borthwick,* 105 F.2d 286 (1939); *Lord v. Territory,* 79 F.2d 761 (1935); *Hill v. Carter,* 47 F.2d 869 (1931); *Honolulu Rapid Transit v. Wilder,* 36 F.2d 159 (1929); *Ewa Plantation Co. v. Wilder,* 289 Fed. 664, 670 (1923), and cases cited.

for this classification. The only question then remaining is whether *this classification* is valid.

Shortly stated, the Supreme Court of Hawaii found that post exchanges and ships' service stores belong in the same class as the War and Navy Departments of which they are integral parts, and in which they function as arms of the federal government performing federal functions. Appellant persists in classing post exchanges and ships' service stores as "retail merchants", and even if this court should hold that they are not such within the meaning of the tax act, he still argues that sales to them must receive the same treatment as sales to retail merchants.

As set forth in the "statement of the case" supra, the General Excise Tax of the Territory falls on the business of a manufacturer, a farmer or other producer, a construction contractor, a theatre or other amusement business, services whether professional or otherwise, and every "business, trade, activity, occupation, or calling" not included in a specific provision of the Act. (Sec. 2, Appendix.) Included in the taxes levied by the statute is a tax upon the business of selling tangible personal property in the Territory measured by the gross proceeds of sales of the business. (Sec. 2B, Appendix.) This tax, consonant with the all inclusive scheme of the statute, falls on every sale, and is not limited to sales at the retail level. At the time in question the rate of tax on each and every activity was fixed at 1½%,[33] with only two

[33]This was in lieu of the 1¼% specified in the statute, by virtue of an adjustment made under subsection III of section 2.

exceptions: (1) Manufacturers of products other than sugar, pineapples and other canned goods, were taxed at ¼ of 1%. (2) Persons engaged in the business of selling tangible personal property in the Territory were taxed at ¼ of 1% if they could qualify as wholesalers or producers, otherwise at 1½%.

Appellant rests his claim to the reduced rate on the contention that he qualifies as a "wholesaler". It must be noted here that the burden of sustaining this claim is on the appellant. Appellee-tax commissioner has shown that appellant is a "person engaging or continuing within this Territory in the business of selling any tangible personal property whatsoever" and that he had certain "gross proceeds of sales of the business" (quoting from Sec. 2B, Appendix). That is enough to cause the tax to apply at the rate of 1½% unless appellant becomes entitled to a deduction by bringing himself within the "wholesaler" provisions. He claims a favored position, which like an exemption provision is a privilege, and like an exemption provision must be strictly construed.[34]

To qualify as a wholesaler appellant must meet the definition set forth in section 1, subsection (10), of the statute (Appendix), particularly clause (a) thereof upon which he bases his claim. The relevant provision reads as follows:

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[34] 1 *Merten's Law of Federal Income Taxation*, Sec. 3.08;
Remco S. S. Co. v. Commissioner, 82 F.2d 988 (C.C.A. 9th), cert. den. 299 U.S. 555, 57 S.Ct. 17, 81 L.Ed. 409;
Bank of Hawaii v. Wilder, 8 F.2d 845 (C.C.A. 9th);
Atlantic Coast Line R. Co. v. Phillips, 332 U.S. 168, 67 S.Ct. 1584, 91 L.Ed.Adv.Sh. 1538 (1947);
Re Excise Tax Robert Hind, Ltd., 34 Haw. 40.

> "(10) 'Wholesaler' or 'jobber' shall apply only to a person doing a regularly organized wholesale or jobbing business, known to the trade as such, and only with respect to the following sales: (a) sales, to a licensed retail merchant or jobber, for purposes of resale; * * *"[35]

It is conceded that appellant's business is known to the trade as a wholesale business. The ground of disallowance of the claimed classification was failure to meet the requirements of clause (a).

Appellant urges that it was "manifest error" for the Supreme Court of Hawaii not to adopt the opinion of the dissenting judge.[36] Clause (a) was interpreted by the dissenting judge (R. 218, 235) as having exactly the same meaning as if it read "sales for purposes of resale", omitting the key words "to a licensed retail merchant or jobber". According to the dissenting judge every entity which resells is either a retail merchant or jobber (R. 218-219); and every reseller is "licensed", for it either is lawfully authorized to resell without the license required by section 21 (Appendix) and hence "licensed" by the authority that permits this (R. 235) or is licensed

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[35]The alternative definition of "wholesaler", to be used in the event the consumption tax law of the Territory should be invalidated by judicial decision (Sec. 1(10), Appendix), has not come into effect (Cf. Br. 46, where the alternative definition is quoted but the statutory explanation as to the use of the alternative definition is omitted).

[36]The dissenting judge differed from the majority only as to the points involved in Part B of this brief.

under section 21 itself in the sense in which the majority (R. 199-200) used the term.[37]

By this method the words "to a licensed retail merchant or jobber" were read by the dissenting judge the same as the words "for purposes of resale" already in the statute, and the additional limitation required by the words "to a licensed retail merchant or jobber" was deleted by him from the statute. Such judicial deletion of statutory language of course is not permissible,[38] and is manifest error.

The majority opinion gave full effect to the language used by the legislature. It interpreted "retail merchant" as referring to one engaged in business as distinguished from the performance of governmental functions[39] (R. 200-201), and "licensed" as

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[37]The dissenting judge deliberately widened the wholesaler class, in order to narrow the class taxable at 1½% from "every person" not a wholesaler or producer, to "every retailer" (R. 216). This was under the mistaken assumption that the running head of subsection B of section 2 was controlling. Of course, such a heading is not controlling, nor can it be used to create an ambiguity where none exists. 2 *Sutherland, Statutory Construction*, 3d ed., secs. 4903, 4802; majority opinion, R. 197-8, 201-2. Even if the heading had the importance assigned to it by the dissenting judge it would merely narrow those taxed under subsection B to "retailers", "wholesalers", and "producers", each of which is defined in section 1. There would be no occasion to widen the class of "wholesaler" any more than that of "retailer", and those sales not falling under either definition would be taxable under subsection H of section 2 at 1½%.

[38]It violates the cardinal rule of statutory construction that courts are bound to give effect to all parts of a statute; "no sentence, clause or word shall be construed as unmeaning or surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute". *In re Pringle*, 22 Haw. 557, 564.

[39]This interpretation is supported by a decision in a similar case, *State v. Owin*, 191 La. 617, 186 So. 46 (1938). There the statute

referring to those required by section 21 of the act to take out a license and themselves pay a tax (R. 199-200). As a result all sales, as well as other activities, are taxed at 1½%, except those sales which in normal distribution through commercial channels bear two taxes (viz., one when sold at wholesale and one when sold at retail). Only as to those sales is the reduced rate of ¼ of 1% allowed, in order to avoid undue pyramiding of the tax. This leaves subject to the 1½% tax all cases where only single taxation is involved, designated by the trial court as class (1) sales (R. 105-106), and including all sales to the territorial and federal governments and agencies thereof, charitable institutions, hospitals, fraternal benefit societies, public utilities, users and consumers, and others not themselves subject to the tax. This class includes all such sales irrespective of whether the goods are sold in wholesale lots or at wholesale prices, and irrespective of whether the goods are intended to be and are resold by the purchasers, or what is done with such goods. The evidence shows as examples of inclusion in this class irrespective of intended resale, sales to: School cafeterias of the Territory of Hawaii; public utilities selling stoves, refrigerators, heaters and the like but not subject to

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imposed a license tax, the tax on retail dealers being at a higher rate than the tax on wholesale dealers. In order to be classed as a wholesale dealer the taxpayer had to show that he sold to "dealers for resale". His business was that of buying gold and silver, which he melted, made into bars or plates, and then sold. Ninety per cent of the gold and silver handled by him was sold to the United States. The court held "that the United States Government cannot be classified as a dealer in old gold and silver", and that the taxpayer must pay at the retail rate.

the general excise tax on such resales because of inclusion thereof in public utility business subject to public utility tax; hospitals and other tax exempt institutions; post exchanges and ships' service stores. (R. 157-159, 160-163, 164-167.) In all such cases the second sale actually existed but was disregarded (R. 162-163), causing a single taxable sale to be treated as such, whether the reason was that no further sale would occur or that a further sale would not be taxable.

So read the statute is one which makes a classification based upon the purpose of avoiding undue pyramiding of the tax or double taxation.[40] The scope of the tax act is all inclusive, and with few exceptions the rate of tax on each activity is 1½%. If it were not for the provision in question it frequently would happen that the distribution of an item of goods carried two or more taxes at 1½%.

There remains to be considered the validity of the classification so made; this is the subject of point 2 of this part, in which the correctness of the Supreme Court of Hawaii's interpretation will be further considered.

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[40]That this was the "reason and spirit" of the provision for the lower tax rate was considered by the majority (R. 202). The "reason and spirit" of the law is stated by the legislature to be "one of the most effectual means of discovering the true meaning of the law". (Sec. 12, Revised Laws of Hawaii 1945.) The dissenting judge did not take into account the purpose of the statute. His opinion states that the legislature intended to prevent the lower tax rate from applying in the case of a wholesaler selling to a consumer (R. 219) but does not state what purpose was served thereby that would not also be served by the provision as construed by the majority.

2. The legislative classification was made to avoid undue pyramiding of the General Excise Tax; it consistently carries out this purpose without discrimination and is constitutional.

In this part of the brief appellee-tax commissioner submits argument on the questions stated earlier in this brief, to wit:

Can the Territory of Hawaii, in a privilege tax act which taxes every sale, service or other activity, avoid the undue pyramiding of the tax by prescribing a lower rate where a second taxable activity is to follow? If it does so, must it segregate and give consideration to an activity of the United States which, for taxation purposes, it is required to disregard?

The answers to these questions clearly support the tax statute. But it should be noted that the appellee-tax commissioner does not have the burden of supporting it. It is for the taxpayer to show that the statute clearly and beyond question is unconstitutional and invalid.[41]

Avoidance of double taxation as a ground of classification.

The answer to the first question above stated has been settled in numerous cases. Avoidance of the pyramiding of taxes or double taxation is a valid purpose; no unconstitutional discrimination results because one class, subject to double taxation, is allowed an exemption or

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[41] *Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 84 L.Ed. 590, 593; *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79, 31 S.Ct. 337, 55 L.Ed. 369, 377-378; *Henderson Bridge Co. v. Henderson City,* 173 U.S. 592, 615, 19 S.Ct. 553, 43 L.Ed. 823; *City and County of San Francisco et al. v. Market St. Ry. Co.,* 98 F.2d 628, 633 (C.C.A. 9), cert. den. 305 U.S. 657, 59 S.Ct. 357, 83 L.Ed. 426, reh'g den. 306 U.S. 667, 59 S. Ct. 460, 83 L.Ed. 1062.

deduction to avoid it, while another class, not subject to double taxation, does not receive it.[42] That the purpose of an exemption is to avoid double taxation may even be read into a statute though not clearly expressed.[43]

The United States in relation to the composite tax structure.

The next question is whether sales to the United States must receive a reduced tax rate simply because there are sales which in consideration of other taxes do receive a reduced tax rate. To argue for this proposition is to set up an arbitrary privilege whereby the indirect interest of the United States in any taxable subject automatically confers upon it, at each stage of the taxing process separately considered, the most favorable tax treatment allowed to any, irrespective of the composite tax structure. Such is not the law. In *Tradesmen's National Bank v. Oklahoma Tax Commission*,[44]

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[42]*Colgate v. Harvey*, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, and cases cited on first point, overruled on second point in *Madden v. Kentucky*, supra, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590; *West Publishing Co. v. McColgan*, 27 Cal.2d 705, 166 P.2d 861, aff'd 328 U.S. 823, 66 S.Ct. 1378, 90 L.Ed. 1603, reh'g den. 329 U.S. 822, 67 S.Ct. 35, 91 L.Ed. 83; *Appeal on Fidelity-Philadelphia Trust Co.*, 354 Pa. 255, 47 A.2d 267 (1946); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586, 57 S.Ct. 524, 81 L.Ed. 814, 821; *Nesbitt v. Gill*, 227 N.C. 174, 41 S.E.2d 646, 653, aff'd per curiam Oct. 13, 1947, 332 U.S. ....., ... S.Ct. ....., 92 L.Ed.Adv. Ops. 13.

[43]*Carpenter v. Carman Distributing Co.*, 111 Colo. 566, 144 P.2d 770 (1943). An exemption of sales of substances becoming ingredients of services furnished by the purchaser was limited by statutory interpretation to cases where the purchaser would incur a tax upon his own use of the commodity. 51 *Am. Jur.* 340, sec. 286.

[44]This case and *Pacific Co. v. Johnson*, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893, discredit the earlier cases of *Miller v. Milwaukee*, 272 U.S. 713, 47 S.Ct. 280, 71 L.Ed. 487, and *Macallen Co. v. Massachusetts*, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874, which appellant relied upon in the lower court, but apaprently no longer relies upon.

309 U. S. 560, 567, 60 S.Ct. 688, 84 L.Ed. 947, there was involved a franchise tax on a national bank measured by net income. Such a tax was expressly restricted by Act of Congress to a rate not higher than "the highest of the rates * * * assessed upon mercantile, manufacturing, and business corporations" doing business within the state. National banks were required to *include* in the measure of the tax the interest from tax-immune federal securities, and so were State Banks and Morris Plan Companies. Other types of corporations were taxed upon their net income *excluding* interest from tax-immune federal securities. The court held this was not an invalid discrimination. The issue "turns upon an examination of the whole tax structure of the state", the court said.[45] The corporations free from net income tax on the revenue of tax-immune federal bonds were required to include those bonds in the value of their capital stock subject to a separate corporate license tax, and with few exceptions, the total taxes paid exceeded the total imposed on national banks. The court held that:

> "* * * considering all the taxes imposed * * * the scheme of taxation adopted by Oklahoma does not discriminate against national banking associations."
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> p. 568.

The Supreme Court of Hawaii followed the same method. It balanced against the 1½% paid upon a sale to the United States, its post exchanges and ships' service stores, the ¼ of 1% paid upon a sale to a li-

[45] p. 568.

censed merchant, plus the 1½% added before the goods reach the consumer through taxation of the sale by the merchant, and found that this totaled 1¾%, or more than the tax on the sale to the United States, its post exchanges and ships' service stores.

Appellant attacks the use of this method by the Hawaii court (Br. 58-59). Appellant seems to forget that it is the burden on the United States which he assails, and that to measure the economic burden by the same yardstick as if it were actually a tax is as favorable consideration of his contention as he can expect. The alternative would be to disregard the economic burden altogether.

Since the composite tax structure is the yardstick, it follows that the power to differentiate in rates upon consideration of other taxes is not one which can be exercised arbitrarily, and appellee's fear that this power will be used destructively (Br. 57) is an imaginary one.[46]

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[46]The dissenting judge, instead of recognizing that the total of taxes charged to others is a ceiling on the amount of economic burden on the United States, thought that the United States must receive a *positive advantage* in the form of a 1½% differential between the combined economic and tax burden on retail merchants and the economic burden on the post exchanges of the United States. (R. 227.) Appellant too argues that post exchanges must have an advantage over retail merchants (Br. 60). No authority is cited for this theory, which would call for absurd results. For example, in the case of a tax imposed on the sale and the storage of gasoline, but not both (cf. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 52 S.Ct. 631, 76 L.Ed. 1232), no tax could be collected on the sale of gasoline to the United States because the United States could not have been taxed on the storage, and according to the theory advanced, it would be necessary to give the United States an advantage in the amount of this tax exemption.

Wilson v. Cook, supra,[47] affords a decisive answer to appellant's claim of discrimination. As previously noted there was before the court the contention that a tax on the privilege of purchasing timber from the United States and severing the timber from its lands laid an unconstitutional burden on the United States. This tax was required to be collected by the purchaser from the owner of the timber land, by withholding from the proceeds of the sale. The court held that whether or not this procedure could be followed where the company was purchasing from the United States, the tax assessed against the company did not impose an unconstitutional burden on the United States. It said:

> "* * * We obviously do not by our judgment against the plaintiffs [Wilson Company] impose the tax on the Government. Their property alone is subject to the lien of the present judgment and to execution issued under it. They cannot recover the amount of the judgment from the Government unless the Constitution permits. And if it forbids they obviously will not collect the tax. *In neither case does our judgment impose any burden on the United States.* * * *" (Italics added).
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> pp. 484-485.

Hence, Wilson Company could not rely on the federal immunity even if it alone of all timber companies, solely because it was dealing with the United States, was prevented from passing on the tax by withholding it from the proceeds. As a result, it would be required to itself pay a tax because it was dealing with the

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[47]327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946).

United States, which other timber companies did not pay because they passed it on. The possible discrimination against those dealing with the United States was not overlooked. Mr. Justice Rutledge, dissenting, urged it upon the court. The six member majority of the court (a seventh justice concurring in the result) found the discrimination point immaterial to the question before it, which was the contention that the tax on Wilson Company laid an unconstitutional burden on the United States. The majority of the court pointed out[48] that the argument against application of the tax to Wilson Company without recourse against the government, when other companies had recourse against their vendors, *would lie under the equal protection clause,*[49] not the federal immunity doctrine.

The action of the majority of the court in the *Wilson* case obviously was correct under the rule that the composite tax structure is the yardstick. The economic burden on the United States caused by the fact that one purchasing from it must pay a tax, would not exceed the tax withheld from other timber owners.

Kaiser Company v. Reid, supra,[50] is most informative. The United States appeared in the case as an

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[48]p. 485.

[49]So far as the equal protection clause (properly speaking, since the case arises in a territory, the due process clause) may be involved here, the valid purpose to avoid the pyramiding of tax or double taxation (discussed supra under the caption "Avoidance of double taxation as a ground of classification", pp. 35 to 36), and the proper making of classifications to carry out this valid purpose (discussed infra under the caption "The alleged juridical discrimination", pp. 48 to 50), answer any such contention.

[50]30 Cal. Adv. 614, 184 P.2d 879 (1947).

intervenor. Significantly, the case has not been taken to the Supreme Court of the United States.

Kaiser Company was the lessee of shipyards and facilities owned by the United States. The company operated this property under a cost-plus contract with the United States. Under California law a fee simple is subject to an *ad valorem* property tax. If the fee simple is taxed that assessment includes all of the separate interests in the property. However, if the fee simple is exempt, separate possessory interests are taxed to those holding them.[51]

There was internal evidence of the California practice in the *Kaiser* case. As to one shipyard, the land was privately owned and leased to the company for use under its contract with the United States. In this instance the private owner was assessed on the fee simple, and Kaiser Company was assessed only on its possessory interest in the government owned facilities. Where the United States owned both the land and the facilities Kaiser Company was assessed on its possessory interest in both.

The assessments were upheld, and the contention that they violated the federal government's immunity from taxation was denied, with citation of *United States v. Allegheny County,* supra,[52] in which the Supreme Court had left open the right to tax the possessory interest.

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[51]This practice was attacked as discriminatory in the earlier case of *Hammond Lumber Co. v. County of Los Angeles,* 104 Cal. App. 235, 285 Pac. 896; it was upheld as not discriminatory since the leasehold interest was assessed in all cases where the fee was exempt.

[52]322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

To summarize the foregoing: Under the California system only those who lease from the United States and other exempt owners must pay a tax. Those who lease from taxable owners pay no tax. Obviously a less favorable rent can be obtained by the United States and other exempt owners than can be obtained by taxable owners. However, considering the composite tax structure, there is no discrimination. The loss in rent which the exempt owner may suffer is no greater than the tax which the private owner must pay.

The California court pointed out that the treatment of lessees of the federal government was no different from the treatment of lessees of the state and city governments. This is reminiscent of the argument made in and sustained by the lower court, and set forth infra[53] that Hawaii treats all sales to exempt purchasers the same.

S.R.A. Inc. v. Minnesota, supra,[54] is very similar to the *Kaiser Co.* case. The *S.R.A.* case involved an ad valorem property tax assessed against one holding an abandoned post office site under a contract of purchase from the United States. Minnesota pays heed to an uncompleted land purchase agreement only when the vendor is exempt, in which event the purchaser is taxed,[55] or when failure to consider the contract would deprive the property of a charitable or other exemp-

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[53]See discussion under the caption "The alleged juridical discrimination", pp. 48 to 50.

[54]327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946).

[55]Minnesota Statutes 1941, secs. 273.19, 273.21, 92.51.

tion to which it is entitled.[56] There was internal evidence of this practice in the case,[57] though it was not commented upon.

It was argued that to sustain the tax on the purchaser would injuriously affect the United States. The court denied this contention saying:

> "There is a suggestion that to hold United States property subject to state taxation pending the completion of payment will injuriously affect its salability and therefore interfere with the Government's handling of its affairs. Our recent cases have disposed of this economic argument in a way which is contrary to petitioner's contention. *Alabama v. King & Boozer,* 314 U.S. 1, and cases cited."
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> p. 570.

The alleged inclusion of federal activities in the measure of the tax.

Appellant relies upon *Mayo v. United States,* supra,[58] *United States v. Allegheny County,* supra,[59] and *Missouri v. Gehner.*[60] In the *Mayo* case the tax was imposed directly on the United States for its activity of bringing commercial fertilizer into Florida. In the *Allegheny County (Mesta Machines Co.)* case, the tax was imposed on a lessee from the United States measured by more than his possessory interest in the prop-

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[56]*Village of Hibbing v. Commissioner of Taxation,* 217 Minn. 528, 14 N.W.2d 923.

[57]The decision in *Village of Hibbing v. Commissioner of Taxation,* supra, preceding note, was cited and commented upon in the Minnesota decision under review in the *S.R.A.* case. 219 Minn. 493, 18 N.W.2d 442.

[58]319 U.S. 441, 63 S.Ct. 432, 87 L.Ed. 1504 (1943) (Br. 35).

[59]322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944) (Br. 36, 38).

[60]281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930) (Br. 59).

erty, and hence inclusive of the interest of the United States. In the *Gehner* case the vice of the tax was that the federal bonds were not disregarded.[61] The tax was laid on net value, arrived at by the deduction of reserves. Since the deduction for reserves was reduced by part of the amount of federal bonds, obviously this amount of federal bonds was added to the net value and was taxed.

This leads to the question whether the sales made by the post exchange,[62] a federal activity, were or were not disregarded. The dissenting judge thought they were not disregarded (R. 221), and appellant so argues (Br. 54). Such is not the case.

To illustrate: Suppose the Hawaii law imposed a tax of, first, 1¾% upon all sales to retail merchants for resale with no second tax levied, the second tax being included in the measure of the first tax;[63] secondly, 1½% upon all sales to the territorial and federal governments and exempt institutions, irrespective of intended resale, and upon all sales to consumers, that is to say, wherever there was no second sale or it was not to be included in the measure of the tax. In such a case appellant would insist upon being classed with the second group.[64] He would rightly argue that it

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[61]281 U.S. at p. 322.

[62]This term is used here and below as inclusive of ships' service stores.

[63]This is the effective rate under the actual law since ¼ of 1% on the first sale and 1½% on the second sale total 1¾%.

[64]The dissenting judge thought that the tax exempt status was the thing to be disregarded, not the federal resale (R. 221). The illustration shows the error of this method. The tax exempt status must be kept in view, and the federal resale accordingly disregarded.

was no business of the Territory of Hawaii what the federal government did with the goods,[65] that if sales to post exchanges were included in the first group the Territory would be wrongfully considering and taking into account a federal activity, namely the intended resale at the post exchange.

We fail to see why the situation is any different because under the actual Hawaii law, the tax is, first ¼ of 1% upon the first sale to, and 1½% upon the second sale by, a retail merchant; secondly, 1½% upon all sales to the territorial and federal governments and exempt institutions, irrespective of intended resale, and upon all sales to consumers, that is to say, wherever the first sale is the last taxable sale.

Hence, in answer to the second question put at the beginning of this point: In a tax system devised to avoid undue pyramiding of the tax or double taxation, must the Territory segregate, and give consideration to an activity of the United States, which for taxation purposes it is required to disregard, we say emphatically, "No."

Only if the Territory charged 1¾% upon sales to non-taxable vendees for resale, would the exempt federal activity be included in the measure of the tax in violation of the *Mayo, Mesta Machine Co.* and *Gehner* cases. Such tax would be ¼ of 1% more than on a

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[65] *Jefferson County v. United States, supra,* 164 F.2d 184 (C.C.A. 5th 1947), holding that the use made of property by the federal government cannot be considered by a local taxing authority; Powell, *"The Waning of Intergovernmental Tax Immunities"*, supra, 58 Harv.L.R. 633, 646, 656.

sale to one making no resale, and hence would wrongfully take into account the resale activities of the federal government, with which the Territory has no concern. *The touchstone is that rate of tax upon sales to consumers.* Since the rate upon sales to post exchanges is the same as upon sales to consumers, the federal activity in reselling the goods truly is disregarded.

The alleged factual discrimination.

Appellant claims that the post exchanges are in competition with others for goods at the wholesale level (Br. 54-56, 60-61). The same argument could be made as to any department of the United States government. These government departments, like the post exchanges, buy in wholesale lots and at wholesale prices. Therefore they too are buying in the wholesale market in the trade sense of that term. Yet appellee does not claim that other sales to the United States should be rated at ¼ of 1%. He recognizes that when the government department is a consumer the rate of 1½% applicable to sales to other consumers is proper. Hence, he does not insist, and indeed he could not, that differentiations in rate amongst sales which the trade considers "wholesale," are forbidden. What he does insist is that no differentiation in rate can be made amongst sales for resale.

What is there in the intended resale that marks sales to post exchanges for more favorable treatment than sales to the War Department itself? The conten-

tion is that the post exchanges *are in competition with retail merchants* for business (Br. 56).

In the first place the claim is false. Post exchanges are not in competition with retail merchants for business. As characterized by the Supreme Court of the United States:[66]

> "* * * The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices."

The United States is a government of delegated powers. All of its functions necessarily are governmental.[67] In this it differs from a state, whose functions are not necessarily governmental.[68]

In the Supreme Court case[69] the profits of a post exchange, if any, were treated as incidental. If supplies are retailed by business houses in a convenient and satisfactory manner as cheaply as the government could do it, it is not the function of the post exchanges to go out and take the business away from them. Nowhere in the Supreme Court case or the Army Regulations (Ex. D, R. 41-97) is such a competitive purpose contemplated or sanctioned.

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[66]*Standard Oil Co. v. Johnson, supra,* 316 U.S. 481, at pp. 484-5.

[67]*Federal Land Bank v. Bismarck Co.,* supra, 314 U.S. 95, 102, 62 S.Ct. 1, 86 L.Ed. 65; Powell, *"The Waning of Intergovernmental Tax Immunities"*, supra, 58 Harv.L.R. 633, 646, 656.

[68]Whether or not the word "proprietary" is still in good repute as descriptive of certain non-governmental functions of the states is not material (cf. Br. 49, citing *New York v. United States,* 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326).

[69]Supra, note 66.

Secondly, the complaint is one which should come from the post exchanges to merit serious consideration. They do not make it. Obviously, if not satisfied with the prices of goods in the Territory of Hawaii they will purchase elsewhere.[70] This is appellant's real complaint; it lies to the burden put on local business in competition with mainland suppliers. Such a complaint must be addressed to the legislature, not the courts.

In the third place, if competition did exist between post exchanges and retail merchants, the argument based thereon already has been answered, upon consideration of the composite tax structure.[71]

In the fourth place, in so far as the tax may be reflected in the price paid by the post exchange, and may cause the service afforded by the post exchanges not to be as cheap as it otherwise would be, that is an economic burden which the Supreme Court has held the United States must assume.

The alleged juridical discrimination.

Appellee-tax commissioner agrees that a classification must have a valid purpose and be properly made to carry out that purpose.[72] Appellee has shown that the purpose of the classification made by the leg-

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[70]39 Ops. Atty. Gen. 316, 322, supra.

[71]Discussed supra under the caption "The United States in relation to the composite tax structure", pp. 36 to 43.

[72]The cases cited in Appellant's Br. 53 are cases in support of this general principle.

islature is to avoid undue pyramiding of the tax or double taxation, and that this is a valid purpose.[73] Appellee further has shown that the classification has been properly made to carry out that purpose.[74] To summarize: Sales to the post exchanges are classed by the statute with other sales to the federal government, and with sales to the territorial government and agencies thereof, charitable institutions, hospitals, fraternal benefit societies, public utilities, users and consumers, and others not themselves subject to the tax. This class includes the instances in which no second taxable sale will occur, either because there will be no second sale (e.g., sales to the federal and territorial government for their use, and to other users and consumers), or because though a second sale will occur it will not be taxable and hence is disregarded (e.g., sales of food to school cafeterias, sales of stoves and refrigerators to public utilities for resale, sales of medicines to hospitals for resale, and sales to the post exchanges). These are all instances in which there is no occasion to allow a reduced rate, since there is no double taxation to be avoided.

This court already has held that a classification having a valid purpose may be applied to those dealing with the federal government the same as to others. In *Yerian v. Territory,*[75] supra, this court summarily dis-

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[73]Supra, point 1 of this part B, pp. 28 to 34, and discussion under the caption "Avoidance of double taxation as a ground of classification", p. 35.

[74]Supra, note 73.

[75]130 F.2d 786, 790.

posed of the contention that to require federal employees to file tax returns discriminated against the federal government, pointing out that the same requirement applied to all employees of non-resident employers. This was in accordance with the general rule that if those who deal with the federal government are treated *as fairly as others similarly situated,* there is no ground for complaint.[76]

CONCLUSION.

Appellee-tax commissioner respectfully submits that the Territory of Hawaii lawfully can include in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, the gross proceeds of sales made to the United States, and the post exchanges and ships' service stores which are integral parts thereof. The Territory was created by

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[76]Thus in *Wood v. Tawes,* 181 Md. 155, 28 Atl. 2d 850, 854 (1942), cert. den. 318 U.S. 788, 63 S.Ct. 982, 87 L.Ed. 1154, the claim of certain federal officers, taxed on their compensation, that there was discrimination against them, was denied because they failed to show that state officers in comparable positions were treated more favorably.

In *Wood Bros. v. Bagley,* 232 Iowa 902, 6 N.W.2d 397 (1942), the law provided that there should be refunded to the consumer the fuel tax, in the amount of three cents per gallon, paid on fuel which ultimately was not used for motor vehicle transportation. As an exception to this refund provision the law provided that if the fuel had been used for construction work paid for from public funds there would be no refund. As a result, a contractor dealing with the government was required to pay three cents more per gallon on fuel used in construction work for the government than on fuel used in other construction work. It was held that the exception applied where the construction work was paid for from federal funds the same as where paid for from state or county funds.

Congress as a sovereign government with full power to impose taxes, and its power to tax the United States and its instrumentalities is as great as, though no greater than, the powers of the states with respect to such taxation. The inclusion of gross proceeds of sales to the United States, its post exchanges and ships' service stores, in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, has only an economic effect upon the federal government, and does not constitute the tax an invalid burden upon or interference with federal activities. The *Panhandle* line of cases has been overruled.

Appellee-tax commissioner further submits that the Territory of Hawaii, in a privilege tax act which taxes every sale, service or other activity, can avoid the undue pyramiding of the tax by prescribing a lower rate where a second taxable activity is to follow. In such a tax system, the Territory need not segregate and give consideration to an activity of the United States which for taxation purposes it is required to disregard; such federal activity may and should be disregarded for all purposes. The Supreme Court of Hawaii correctly interpreted the tax statute as classifying sales to post exchanges and ships' service stores with sales to the federal and territorial governments, charitable institutions, hospitals, fraternal benefit societies, public utilities, users and consumers, and others where no second taxable activity occurs. This classification properly carries a tax rate of 1½% in common with other business activities, in

contradistinction to sales to licensed retail merchants, where to avoid undue pyramiding of the tax a tax rate of ¼ of 1% is allowed.

Dated, Honolulu, Territory of Hawaii, March 30, 1948.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

ACT 141 (SERIES A-44) SESSION LAWS OF HAWAII 1935, AS AMENDED TO AND INCLUDING THE SESSION LAWS OF HAWAII, 1943.

Italics indicate provisions added by Act 81 (Series A-54) Session Laws of Hawaii, 1943.

Section 1. *Definitions.* When used in this Act, unless otherwise required by the context:

(1) "Commissioner" or "tax commissioner" shall mean the tax commissioner of the Territory of Hawaii.

(2) "Person" or "company" shall include every individual, partnership, society, unincorporated association, joint adventure, group, hui, joint stock company, corporation, trustee, executor, administrator, trust estate, decedent's estate, trust or other entity, whether said persons are doing business for themselves or in a fiduciary capacity, and whether the individuals are residents or non-residents of the Territory, and whether the corporation or other association is created or organized under the laws of the Territory or of another jurisdiction.

(3) "Tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commissioner to use same as the tax period in lieu of the calendar year.

(4) "Sale" or "sales" includes the exchange of properties as well as the sale thereof for money.

(5) "Taxpayer" means any person liable for any tax hereunder.

(6) "Gross income" means the gross receipts, cash or accrued, of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and all receipts, actual or accrued as hereinafter provided, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees, or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor cost, taxes, royalties, interest or discount paid or any other expenses whatsoever. Provided, that every taxpayer shall be presumed to be dealing on a cash basis unless he proves to the satisfaction of the commissioner that he is dealing on an accrual basis and his books are so kept, or unless he employs or is required to employ the accural basis for the purposes of the tax imposed by chapter 65 of the Revised Laws of Hawaii 1935 for any taxable year in which event he shall report his gross income for the purposes of this Act on the accrual basis for the same period.

(7) "Business" as used in this Act, shall include all activities, (personal, professional or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but shall not include casual sales.

(8) "Gross proceeds of sale" means the value actually proceeding from the sale of tangible personal property without any deduction on account of the

cost of property sold or expenses of any kind. The words "gross income" and "gross proceeds of sales" shall not be construed to include the gross receipts from the sale of bonds or other evidence of indebtedness or stocks or from the sale of real property; cash discounts allowed and taken on sales; the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; or the sale price of any article accepted as part payment on any new article sold if the full sale price of the new article is included in the "gross income" or "gross proceeds of sales." And accounts found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross proceeds of sale, or gross income, within this Act, so far as they reflect taxable sales made, or gross income earned after July 1, 1935, but shall be added to gross proceeds of sale or gross income when and if afterwards collected.

(9) "Service business or calling" shall include all non-professional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the production or sale of tangible property, but shall not include the services rendered by an employee to his employer.

(10) "Wholesaler" or "jobber" shall apply only to a person doing a regularly organized wholesale or jobbing business, known to the trade as such, and only with respect to the following sales: (a) sales, to a licensed retail merchant or jobber, for purposes of resale; (b) sales, to a licensed manufacturer, of mate-

rial or commodities which are to be incorporated by such manufacturer into a finished or saleable product (including the container or package in which the product is contained) during the course of its preservation, manufacture or processing, including preparation for market, and which will remain in such finished or saleable product in such form as to be perceptible to the senses, which finished or saleable product is to be sold and not otherwise used by such manufacturer; or (c) sales, to a licensed contractor, of material or commodities which are to be incorporated by such contractor into the finished work or project required by the contract and which will remain in such finished work or project in such form as to be perceptible to the senses.

Provided, that in the event the consumption tax law shall be finally held by a court of competent jurisdiction to be unconstitutional or invalid in so far as it purports to tax the use or consumption of tangible personal property imported into the Territory in interstate or foreign commerce or both, then and in such event wholesalers and jobbers shall be taxed thereafter under this Act in accordance with the following definition (which shall supersede the preceding paragraph otherwise defining "wholesaler" or "jobber"), to-wit:

"Wholesaler" or "jobber" shall mean a person, or a definitely organized division thereof, definitely organized to render and rendering a general distribution service which buys and maintains at his or its place of business a stock or lines of merchandise

which he or it distributes; and which, through salesmen, advertising or sales promotion devices, sells to licensed retailers, or to institutional, or licensed commercial or industrial users, in wholesale quantities and at wholesale rates.

(11) The term "producer" shall mean and include any person engaged in the business of raising and producing agricultural, animal or poultry products in their natural state, or in producing natural resource products, or engaged in the business of fishing, who sells agricultural, animal or poultry products in their natural state, or butchered and dressed, or the natural resource products, or the fish, for resale or to be incorporated and remain in finished manufactured products, or in the finished work required under a construction contract.

(12) "Retail" means the sale of tangible personal property, other than by a wholesaler as such within the definition of this Act, for consumption or use by the purchaser and not for resale.

(13) "Retailer" shall mean any person who sells, other than as a wholesaler within the definition of this Act, tangible personal property for consumption or use by the purchaser and not for resale.

(14) "Contractor" shall include, for purposes of this Act, every person engaging in the business of contracting to erect, construct, repair or improve buildings or structures, of any kind or description, including any portion thereof, or to make any installation therein, or to make, construct, repair or improve any

highway, road, street, sidewalk, ditch, excavation, fill, bridge, shaft, well, culvert, sewer, or water system, drainage system, dredging or harbor improvement project, electric or steam rail, lighting or power system, transmission line, tower, dock, wharf, or other improvements. *"Federal cost-plus contractor" means a contractor having a contract with the United States or an instrumentality thereof, where, by the terms of the contract, the United States or such instrumentality agrees to reimburse the contractor for the cost of material, plant or equipment used in the performance of the contract and for taxes which the contractor may be required to pay with respect to such material, plant or equipment, whether the contractor's profit is computed in the form of a fixed fee or on a percentage basis; and also means a sub-contractor under such a contract, who also operates on a cost-plus basis.*

(15) "Auditor" means the auditor of the Territory of Hawaii.

(16) The term "engaging" as used in this Act with reference to engaging or continuing in business shall also include the exercise of corporate or franchise powers.

(17) The word "penalty" or "penalties", when used in connection with the additions to the tax imposed for delinquency in payment, shall include interest as well. (L. 1935, c. 141, s. 1; am. L. 1941, c. 265, s. 1; am. L. 1943, c. 81, s. 1.)

Section 2. *Imposition of tax; rates.** I. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

A. *Tax on manufacturers.* (1) Upon every person engaging or continuing within this Territory in the business of manufacturing, compounding, canning, preserving, packing, milling, processing, refining or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances or commodities, manufactured, compounded, canned, preserved, packed, milled, processed, refined or prepared, for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), multiplied by the respective rates as follows:

Millers or processors of sugar, raw or refined, or sugar by-products, one and one-quarter (1¼) per cent; canneries, one and one-quarter (1¼) per cent; all other manufacturers on whose gross income a tax

*Commencing July 1, 1939 all 1¼% rates were raised to 1½% by order of the Governor. (See subsection III relating to increase or decrease of rates.)

is not otherwise levied in this Act, one-quarter (¼) of one per cent.

(2) The measure of the tax on manufacturers is the value of the entire product manufactured, compounded, canned, preserved, packed, milled, processed, refined or prepared, in this Territory, for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the Territory.

(3) If any person liable for the tax on manufacturers shall ship or transport his products, or any part thereof, out of this Territory without making sale of such products, the value of the products in the condition or form in which they existed immediately before entering interstate or foreign commerce shall be the basis for the assessment of the tax imposed in this section. The commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed on manufacturers shall be due and payable as of the date of such entry into interstate or foreign commerce, whether said products have been sold or not. If any person liable for the tax on manufacturers shall ship or transport his products, or any part thereof, outside of the Territory in an unfinished condition, the value of the products or articles in the condition or form in which they existed when shipped or transported out of the Territory and before they entered interstate or foreign commerce shall be the basis of assessment of the tax imposed on manufacturers and the commissioner shall prescribe equitable and uniform rules for ascertaining such value.

(4) In computing the tax levied on manufacturers where the gross proceeds of sales of such manufactured products are taken as the measure of the value of such products for the purpose of computing the tax, if such products shall have been sold on a delivered price, the actual transportation charges prepaid by the taxpayer or included in the invoice price on such manufactured products, to the place of delivery shall be deducted from the gross proceeds of sales used in determining the amount of the tax.

(5) Provided, however, that any person engaging or continuing in the business of refining sugar in the Territory, who purchases raw sugar for such refining, the seller of which raw sugar is taxable in respect to such sale under section 2, I-A, will be entitled to deduct from the amount of the value used for computing the tax, the amount paid by him for such raw sugar. The refiner shall show in his return the amounts of his purchase of such raw sugar and from whom purchased.

(6) In computing the tax levied under section 2, I-A, any person who by reason of the Agricultural Adjustment Act, or other Acts of Congress of the United States, includes as a part of his gross income a processing tax, or other similar tax, paid either to the federal or territorial governments, shall be entitled to deduct from the amount of the value used for computing the tax payable under section 2, I-A, hereof, the amount of the processing tax, or other similar tax, paid by him to the federal government; provided,

however, that this paragraph shall not be construed to entitle the taxpayer to deduct any sums that may be returned and retained as a benefit payment so-called or a like payment by virtue of the Agricultural Adjustment Act or other Acts passed by the Congress of the United Sates relating thereto.

B. *Tax on retailers, wholesalers and producers.* (1) Upon every person engaging or continuing within this Territory in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness or stocks) there is likewise hereby levied, and shall be assessed and collected, a tax equivalent to one and one-quarter (1¼) per cent of the gross proceeds of sales of the business; provided, however, that in the case of a wholesaler or producer, the tax shall be equal to one-quarter (¼) of one per cent of the gross proceeds of sales of the business.

(2) Provided, that gross proceeds of sales of tangible property in interstate and foreign commerce shall constitute a part of the measure of the tax imposed on retailers and wholesalers, to the extent, under the conditions and in accordance with the provisions of the Constitution of the United States and the Acts of the Congress of the United States which may be now in force or may be hereafter adopted.

(3) Provided, however, that any person engaging or continuing in business as a retailer and a wholesaler or as a retailer and a producer shall pay the tax required on the gross proceeds of sales of each

such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business; and when his books are not so kept he shall pay the tax as a retailer.

(4) A manufacturer or producer engaging in the business of selling his manufactured products at retail in this Territory shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in this Act, for the privilege of engaging in the business of selling such products at retail in this Territory; and the value, or gross proceeds of sales, of such products, thus sold by the manufacturer or producer at retail and included in the measure of the tax imposed in this Act, shall be deducted from the gross income, or gross proceeds of sales, used in determining the measure of the tax imposed upon such manufacturer or producer as such.

(5) But a manufacturer or producer engaging in the business of selling his products to manufacturers, wholesalers, or licensed retailers, shall not be required to pay the tax imposed in this Act for the privilege of selling such products at wholesale. Nor shall any such manufacturer or producer be required to pay the tax imposed in this Act for the privilege of selling products for delivery outside of this Territory. But the gross income derived from the sale of such products to manufacturers, wholesalers, or licensed retailers, and the gross income derived from all sales of such products, for delivery outside of this Territory, shall be included in determining the measure of

the tax imposed upon such manufacturer or producer as such.

(6) *Provided, further, that a taxpayer selling to a federal cost-plus contractor may make the election provided for by paragraph (3) of subsection C, and in any such case the tax shall be computed pursuant to the election, notwithstanding any provision of this subsection or subsection A to the contrary.*

C. *Tax upon contractors.* (1) Upon every person engaging or continuing within this Territory in the business of contracting, the tax shall be equal to one and one-quarter (1¼) per cent of the gross income of the business. Provided, however, that the rate of tax levied upon any such person measured by gross income received on account of uncompleted contracts, entered into prior to the effective date of this Act shall be eight-tenths of one per cent. All contracts shall be prima facie presumed to have been entered into subsequent to the effective date of this Act.

(2) Provided, however, that in computing the tax levied under this subsection C, there shall be deducted from the gross income of the taxpayer, so much thereof as has been included in the measure of the tax levied under subsection C (1) on other taxpayers; but any person claiming such deduction shall be required to show in his return the names of the persons paying the amount deducted hereunder.

(3) *Provided, further, that in computing the tax levied under this subsection C against any federal*

cost-plus contractor, there shall be excluded from the gross income of the contractor so much thereof as fulfills the following requirements:

(a) *The gross income exempted shall constitute reimbursement of costs incurred for materials, plant or equipment purchased from a taxpayer licensed under this Act, not exceeding the gross proceeds of sale of such taxpayer on account of the transaction.*

(b) *The taxpayer making the sale shall have certified to the commissioner that he is taxable with respect to the gross proceeds of the sale, and that he elects to have the tax on such gross income computed as if the sale were made to the federal government direct.*

D. Tax upon theaters, amusements, radio broadcasting stations, etc. (1) Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to one and one-quarter (1¼) per cent of the gross income of the business.

(2) Provided, however, that where the rental paid for the use of films in any theater or moving picture house is included in the gross income by which the tax against the lessor of the films is measured under this Act, the amount of rental paid by the lessee operator to such lessor shall be deducted from the lessee

operator's gross income used in determining the measure of the tax imposed upon such operator under subsection D (1).

F. *Tax on service business.* Upon every person engaging or continuing within this Territory in any service business or calling not otherwise specifically taxed under this Act, there is likewise hereby levied and shall be assessed and collected a tax equal to one and one-quarter (1¼) per cent of the gross income of any such business.

G. *Professions.* Upon every person engaging or continuing within this Territory in the practice of a profession, including those expounding the religious doctrines of any church, there is likewise hereby levied and shall be assessed and collected a tax equal to one and one-quarter (1¼) per cent of the gross income of such practice or exposition.

H. *Tax on other business.* Upon every person engaging or continuing within this Territory in any business, trade, activity, occupation, or calling not included in the preceding subsections or any other provisions of this Act, there is likewise hereby levied and shall be assessed and collected, a tax equal to one and one-quarter (1¼) per cent of the gross income thereof. This subsection shall apply to the gross income of persons taxable under other subsections hereof not derived from the exercise of privileges taxable thereunder.

II. Where delivery of any products is made by a taxpayer, taxable under this Act, to other affiliated companies or persons, or under other circumstances where the relation between the manufacturer or producer and the receiver of such products is such that the consideration paid, if any, is not indicative of the true value of the products delivered, the taxpayer shall pay the tax imposed by this Act for the privilege of engaging in the business of producing or manufacturing the products so delivered, measured by the value, corresponding as nearly as possible to the gross proceeds of sale of similar products, of like quality and character, by other persons, where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar. If no such comparable sales exist between non-affiliated buyers and sellers, the commissioner shall prescribe equitable and uniform rules for ascertaining such value.

III. Before the 15th day of June of each year the director of the bureau of the budget shall prepare and submit to the treasurer an estimate of the amount of moneys required for the purpose of meeting the estimated probable expenditures during the next fiscal year, and if the amount of money required is less than the amount of money estimated to be available, the treasurer may, with the written approval of the governor, decrease the rate of one and one-quarter per cent (1¼%) fixed by section 2-I to such extent that the estimated amount to be raised hereunder will only be sufficient to meet the required expenditures.

But if the estimate of the moneys required, in addition to all other moneys estimated to be available for the purpose of meeting the estimated probable expenditure during the next fiscal year, shall be greater than the amount of money available by virtue of the taxes imposed by this Act at the rates fixed by section 2-I thereof, then the treasurer may, with the written approval of the governor increase the rate of one and one-quarter per cent (1¼%) fixed by said section 2-I to such extent, not exceeding an additional one-quarter of one per cent (¼%), that the estimated amount to be raised hereunder will be sufficient (within the limit of such increase) to meet the required expenditures.

Such increase or decrease in rate shall apply to taxes accruing during the said fiscal year.

IV. If any person, other than persons liable to the tax on manufacturers as provided by part A of subsection 1 of this section, is engaged in business both within and without the Territory, and if, under the Constitution or laws of the United States the entire gross income of such person cannot be included in the measure of this tax, there shall be apportioned to the Territory and included in the measure of the tax that portion of the gross income which is derived from activities within the Territory, to the extent that such apportionment is required by the Constitution or laws of the United States. In the case of a tax upon the production of property in the Territory such apportionment shall be determined as in the case of the tax on manufacturers. In other cases, if and to the extent

that such apportionment cannot be accurately made by separate accounting methods, there shall be apportioned to the Territory and included in the measure of this tax that proportion of the total gross income, so requiring apportionment, which the cost of doing business within the Territory, applicable to such gross income, bears to the cost of doing business both within and without the Territory, applicable to such gross income. (L. 1935, c. 141, s. 2; am. L. 1937, c. 128, s. 1; am. L. 1939, c. 252, s. 1; am. L. 1941, c. 115, s. 1; am. L. 1943, c. 81, s. 1.)

Section 3. *Interstate and foreign commerce. Federal agencies.* In computing the amounts of any tax imposed under this Act, there shall be excepted from the gross proceeds of sales or gross income, so much thereof as is derived from sales of tangible property in interstate and foreign commerce, which under the Constitution of the United States, the Territory of Hawaii, is, or may hereafter be, prohibited from taxing, or is derived from any sales made to the United States government, its departments or agencies, which is, or may hereafter be, exempted from taxation under the Constitution of the United States or the Organic Act of the Territory; provided, however, that if and when the Congress of the United States shall permit the Territory of Hawaii to impose a privilege tax upon gross proceeds of sales or gross income derived from sales of tangible personal property in interstate and foreign commerce, or from sales made to the United States government, its departments or agencies, in either such event the exceptions and exemptions by this section provided, shall not apply.

Section 4. *Exemptions.* The provisions of this Act shall not apply to:

(1) The following persons:

(a) National banks; (b) Banks on whose shares of stock or net worth a tax is levied under the provisions of an Act of the legislature of the Territory of Hawaii at its 1935 session, entitled: "An Act to provide for the taxation of the shares of the capital stock of banks; and for the taxation of foreign banks; to provide for the ascertainment, assessment, collection and disposition of such tax; to provide penalties for violations of the terms thereof and to repeal chapter 62, Revised Laws of Hawaii 1935, and all other laws or parts of laws inconsistent herewith;" (c) Public utilities (as that term is defined in the Revised Laws of Hawaii 1935, section 7940), with respect to their public utilities business, upon the gross income from which they pay an annual tax under the provisions of the Revised Laws of Hawaii 1935, chapter 69; (d) Public utilities owned and operated by the Territory or any county or city and county or other political subdivisions thereof; (e) Insurance companies which pay the Territory of Hawaii a tax upon their gross premiums under the provisions of the Revised Laws of Hawaii 1935, chapter 224; (f) Fraternal benefit societies, orders or associations, operating under the lodge system, or for the exclusive benefit of the members of the fraternity itself, operating under the lodge system, and providing for the payment of death, sick, accident or other benefits to the members of such societies, orders or associations, and to their dependents;

(g) Corporations, associations or societies organized and operated exclusively for religious, charitable, scientific or educational purposes; (h) Business leagues, chambers of commerce, boards of trade, civic leagues and organizations operated exclusively for the benefit of the community and for the promotion of social welfare, and from which no profit inures to the benefit of any private stockholder or individual; (i) Hospitals, infirmaries and sanatoria; (j) Cooperative associations now or hereafter incorporated under and pursuant to the provisions of the Revised Laws of Hawaii 1935, chapter 220; provided, however, that the exemption herein provided shall apply only to the gross income derived from its non-profit activities; (k) Building and loan associations, with respect only to interest received by them on loans to members; (l) Lepers and kokuas, with respect to business within the county of Kalawao;

Provided, however, that the exemptions of this section 4 (1) shall apply only to the gross income of those persons enumerated in section 4 (1) (f) to section 4 (1) (i), both inclusive, from non-profit activities.

Provided, further, that the exemptions enumerated in this section 4 (1) from (f) to (k), both inclusive, shall apply only to those persons who (1) shall have registered with the tax commissioner on or before January 31 of each calendar year, or within one month after the commencement of business, by filing a written application for registration in such form as the commissioner shall prescribe, and (2) shall have paid for such registration an annual fee of one dollar

($1.00), and (3) shall have had the exemption allowed by the commissioner or by a court or tribunal of competent jurisdiction upon appeal from any assessment resulting from disallowance of the exemption by the commissioner, and (4) shall make returns of gross income and gross proceeds of sales as required by this Act.

In order to obtain allowance of an exemption an application for exemption shall be filed in the form of an affidavit or affidavits setting forth in general all facts affecting the right to the exemption and such particular facts as the commissioner may require, to which shall be attached such records, papers and other information as the commissioner may prescribe. Such application for exemption shall be filed on or before March 31 of the first year of registration or within three months after the commencement of business. In the event of allowance of the exemption no further application therefor need be filed unless there be a material change in the facts, but such person nevertheless shall register annually. In the event of disallowance of the exemption a license may be obtained without payment of a further fee, and in the event the registrant has a license under this Act no further fee shall be required for registration under this section.

The commissioner for good cause may extend the time for registration or the time for filing an application for exemption, but such extension or extensions shall not aggregate more than a total of two months.

(2) The following gross income or gross proceeds of sales:

(l) Amounts received under life insurance policies and contracts paid by reason of the death of the insured; (m) Amounts received (other than amounts paid by reason of the death of the insured) under life insurance, endowment or annuity contracts, either during the term or at maturity, or upon surrender of the contract; (n) Amounts received by any person under any accident insurance or health insurance policy or contract or under workmen's compensation Acts or employers' liability Acts, as compensation for personal injuries, death or sickness, including also the amount of any damages or other compensation received, whether as a result of action or by private agreement between the parties on account of such personal injuries, death or sickness; (o) The value of all property of every kind and sort acquired by any person by gift, bequest or devise, and the value of all property acquired by any person by descent or inheritance; (p) Amounts received by any person as compensatory damages for any tort injury to him, or to his character or reputation, or received by any person as compensatory damages for any tort injury to or destruction of property, whether as the result of action or by private agreement between the parties; provided, however, that amounts received by any person as punitive damages for tort injury or breach of contract injury shall be included in gross income; (q) The amounts collected by distributors as a fuel tax on "liquid fuel" imposed by the provisions of the Revised Laws of Hawaii 1935, chapter 64 and the amounts collected by such distributors as a fuel

tax imposed by any Act of the Congress of the United States; (r) The amount received by any person as a benefit payment so-called or like payments by virtue of the Agricultural Adjustment Act or other acts passed by the Congress of the United States relating thereto and disbursed to others as such benefit payment; provided that the commissioner may by rule require any deductions to be set forth specifically by the taxpayer in his return; (s) Amounts received as salaries or wages for services rendered by an employee to an employer; (t) Amounts received as alimony and other similar payments and settlements; (u) The amounts collected by retailers and wholesalers as a tax on liquor imposed by the provisions of Act 222, Session Laws of Hawaii 1939. (L. 1935, c. 141, s. 4; am. L. 1939, c. 47, s. 1; am. L. 1941, c. 265, s. 2; am. L. 1943, c. 81, s. 1.)

Section 5. *Computation of tax, payment.* (1) The taxes levied hereunder shall be payable in monthly installments on or before the expiration of twenty days from the end of the month in which they accrue. The taxpayer shall, within twenty days from the expiration of each month, make out and sign an estimate of the tax for which he is liable for such month and transmit the same, together with a remittance, in the form required by section 12 of this Act, for the amount of the tax, to the office of the appropriate territorial divisional tax assessor hereinafter designated. Any person registered or required to be registered under section 4 of this Act, shall file monthly returns of gross income and gross proceeds of sales, but while

his application for exemption is pending before the tax commissioner or if it be allowed no payment of tax need accompany the return.

(2) The commissioner for good cause may extend the time for making any return required under this section, and may grant such reasonable additional time within which to make such return as he may deem proper, but the time for filing such return shall not be extended beyond the twentieth day of the second month next succeeding the regular due date of such return. (L. 1935, c. 141, s. 5; am. L. 1941, c. 265, s. 3.)

Section 6. *Annual return, payment of tax.* (1) On or before March 20 after the end of the tax year each taxpayer shall make a return showing the gross proceeds of sales or gross income, and compute the amount of tax chargeable against him in accordance with the provisions of this Act and deduct the amount of monthly payments (as hereinbefore provided), and transmit with his report a remittance in the form required by section 12 of this Act covering the residue of the tax chargeable against him to the office of the appropriate territorial divisional tax assessor hereinafter designated; such return shall be verified by the oath of the taxpayer, if made by an individual, or by oath of the president, vice-president, secretary, or treasurer, of a corporation, if made on behalf of a corporation. If made on behalf of a partnership, firm, society, unincorporated association, group, hui, joint adventure, joint stock company, corporation, trust estate, decedent's estate, trust or other entity, any individual delegated by such partnership, firm,

society, unincorporated association, joint adventure, group, hui, joint stock company, corporation, trust estate, decedent's estate, trust or other entity shall make the oath on behalf of the taxpayer. If for any reason it is not practicable for the individual taxpayer to make the oath, the same may be made by any duly authorized agent. The tax commissioner, for good cause shown, may extend the time for making such return on the application of any taxpayer and grant such reasonable additional time within which to make the same as may, by him, be deemed advisable.

(2) All monthly and annual returns shall be transmitted respectively to the office of the territorial divisional tax assessor of the taxation division in which the privilege upon which the tax accrued is exercised; provided, however, that where such privilege is exercised in more than one taxation division the said returns shall be transmitted to the office of the assessor of the first taxation division.

(3) *Consolidated reports; inter-related business.* When any taxpayer is engaged in two or more forms of business activity taxable under the provisions of this Act which are inter-related, or which are of like character, such taxpayer shall file a consolidated return covering all business activities, which are thus inter-related or of like character.

(4) The provisions of this section shall apply to every person registered or required to be registered under section 4 of this Act, provided, that while an application for exemption is pending before the tax

commissioner or if it be allowed no payment of tax need accompany the return. (L. 1935, c. 141, s. 6; am. L. 1941, c. 265, s. 4.)

Section 7. *Erroneous returns, disallowance of exemption, payment, refund.* (1) If any return made is erroneous, or is so deficient as not to disclose the full tax liability, or if the taxpayer, in his return, shall disclaim liability for the tax on any gross income or gross proceeds of sales liable to the tax, the tax commissioner shall correct such error or assess the proper amount of taxes. If such recomputation results in an additional tax liability, or if the commissioner proposes to assess any gross income or gross proceeds of sales by reason of the disallowance of an exemption, the commissioner shall first give notice to the taxpayer of the proposed assessment, and the taxpayer shall thereupon have an opportunity within thirty days to confer with the commissioner. After the expiration of thirty days from such notification the commissioner shall assess the gross income or gross proceeds of sales of the taxpayer or any portion thereof which he believes has not heretofore been assessed, and shall give notice to the taxpayer of the amount of the tax, and the amount thereof shall be due and payable on the twenty-first day after the date the notice was mailed, properly addressed to the taxpayer at his last known address or place of business. Provided, that no preliminary notice shall be necessary where the amount of the tax is calculated by the commissioner from gross income returned

by the taxpayer as subject to the tax (unless the taxpayer shall have claimed that the one-quarter (¼) of one per cent rate is applicable and the commissioner shall have applied the one and one-quarter (1¼) per cent rate); in such case the tax shall be due and payable on the tenth day after the date the statement was mailed.

(2) If the amount already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess so paid shall be immediately refunded to the taxpayer upon the requisition of the tax commissioner on the territorial auditor, who shall issue his warrant in the form prescribed by the Revised Laws of Hawaii 1935, section 594, on the territorial treasurer, which shall be payable out of the "gross income tax reserve fund" in the next succeeding paragraph hereof created. The taxpayer may, at his election, apply an overpayment credit to taxes subsequently accruing hereunder. All refunds and the details thereof, including the names of the persons receiving the refund and the amount refunded, shall be posted on a bulletin board which shall be maintained in a place accessible to the public in the office of the assessor of the taxation division in which the person receiving the refund made his returns.

(3) There is hereby appropriated from the general revenues of the Territory, not otherwise appropriated, the sum of ten thousand dollars ($10,000.00) which shall be set aside as a special fund to be known as the "gross income tax reserve fund", the same to be subject to the warrants of the auditor of the Ter-

ritory upon the treasurer of the Territory, as in and by this Act provided.

(4) The tax commissioner in his discretion may from time to time deposit taxes collected by him under the provisions of this Act in the territorial treasury to the credit of the "gross income tax reserve fund" so that there shall be maintained at all times a fund of ten thousand dollars ($10,000.00). (L. 1935, c. 141, s. 7; am. L. 1941, c. 265, s. 5.)

Section 8. *Failure to make return.* If any person shall fail, neglect or refuse to make a return, the commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax. After procuring such information the commissioner shall proceed to assess the tax and shall notify the person assessed of the amount of the tax and penalty. Any assessment of tax by the tax commissioner made pursuant to the provisions of this section shall be final, and any tax so assessed shall be deemed to have been in default from the time when such tax should have been returned and paid. (L. 1935, c. 141, s. 8; R. L. 1935, s. 2025H; am. L. 1941, c. 265, s. 6.)

Section 8-A. *Audits, procedure, penalties.* (1) *Audit.* The commissioner or any duly appointed deputy tax commissioner, assessor, or deputy assessor, or a responsible person designated by the commissioner or by a deputy tax commissioner to act in the premises for the purpose of verification or audit of a return made by the taxpayer, or where there is reasonable ground to believe that any return made is so deficient

as not to form the basis of a satisfactory assessment of the tax, or for the purpose of making an assessment where no return has been made, is authorized and empowered to examine all account books, bank books, bank statements, records, vouchers, taxpayer's copies of federal tax returns, and any and all other documents and evidences having any relevancy to the determination of the gross income or gross proceeds of sales of any taxpayer as required to be returned under this Act and may summon or require the attendance of the person by or for whom the return (if any) has been made or whose tax is being assessed, and any employee of such person, and may summon or require the attendance of any person having knowledge in the premises, naming the time and place in the summons. and may require the production of any books, statements or other evidences open to his examination, and may take testimony in reference to any such matter relevant to the gross income or gross proceeds of sales of the taxpayer for the period under consideration, with power to require that the person so called and appearing shall be interrogated under oath and to administer such oath.

(2) *Additional taxes.* If the commissioner determines that any gross income or gross proceeds of sales liable to the tax have not been assessed he may assess the same as provided in sections 7 and 8 of this Act.

(3) *False swearing perjury.* Any individual knowingly giving false testimony under oath at any such hearing before the commissioner or other person au-

thorized to conduct such hearing under the provisions of this section shall be guilty of perjury and shall be punished as provided by law.

(4) *Refusal to obey summons or testify; penalty.* Any person refusing or neglecting to obey any summons issued by the commissioner or other person authorized to issue such summons under the provisions of this section, and any individual appearing and refusing to testify under oath, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of fifty dollars for the first offense and one hundred dollars for each succeeding offense. (L. 1935, c. 141, s. 8; am. L. 1941, c. 265, s. 7.)

Section 9. *Appeal; correction of assessment.* If any person having made the return and paid the tax for any month or any year as provided by this Act feels aggrieved by the assessment so made upon him by the tax commissioner, he may appeal from said assessment in the manner and within the time and upon giving notice in writing stating his grounds of appeal to the person specified in section 2045 of the Revised Laws of Hawaii 1935. Where final judgment is in favor of the taxpayer for the repayment to him in whole or in part of taxes paid and no appeal has been perfected therefrom, the auditor of the Territory shall, upon the presentation by the taxpayer to him of a certified copy of said final judgment, issue his warrant in payment of said judgment in the form prescribed by the Revised Laws of Hawaii 1935, section 594, on the territorial treasury which shall be payable

out of the "gross income tax reserve fund" in this Act created, provided, however, that where final judgment is in favor of the taxpayer for the redetermination of a monthly installment of tax and no appeal has been perfected therefrom the excess tax paid shall constitute an overpayment credit which shall be applied to taxes subsequently accruing, if any, and refunded to the extent of overpayment of the assessment for the year as herein elsewhere provided. (L. 1935, c. 141, s. 9; am. L. 1937, c. 202, s. 1.)

Section 10. *Tax year.* The assessment of taxes herein made and the returns required therefor shall be for the year ending on the thirty-first day of December. If the taxpayer, in exercising a privilege taxable under this Act, keeps his books reflecting the same on a basis other than the calendar year, he may, with the assent of the tax commissioner, make his annual returns and pay taxes for the year covering his accounting period, as shown by the method of keeping his books.

Section 11. *Tax cumulative.* The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business, trade or calling. A person exercising a privilege taxable under this Act, subject to the payment of all licenses and charges which are conditions precedent to exercising the privilege taxed, may exercise the privilege for the current tax year upon the condition that he shall pay the tax accruing under this Act.

Section 12. *Remittances.* All remittances of taxes imposed by this Act shall be made to the tax assessor to whose office the return was transmitted by money, bank draft, check, cashier's check, money order, or certificate of deposit, who shall issue his receipts therefor to the taxpayer and shall pay the moneys into the territorial treasury as a territorial realization, to be kept and accounted for as provided by law.

Section 13. *Tax debt due Territory; lien; bulk sales; penalty for failure to pay.* (1) A tax due and unpaid under this Act shall be a debt due the Territory and shall be a lien upon the property used in the business or occupation upon which it is imposed. The lien shall have the same priority as the lien of territorial real property taxes.

(2) In any case of the sale in bulk of the whole, or a large part of a stock of merchandise and fixtures, or mechandise, or fixtures, or other assets of a business, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, the seller shall make a written and verified report of such bulk sale to the tax commissioner not later than ten days after the possession, or the control, or the title of the property, or any part thereof, has passed to the purchaser, which report shall contain the name and address of the purchaser, a brief description of the property sold and the purchase price, the date when such sale is to be or was consummated, and such other facts as the tax commissioner may require. The purchaser may make such report for the seller. The purchaser of such property shall with-

hold payment of the purchase price until the receipt of a certificate from the tax commissioner to the effect that all taxes, penalties and interest levied or accrued under this Act against the seller, or constituting a lien upon such property, have been paid, which certificate shall show on its face that the tax commissioner has had notice of the bulk sale, and shall also show the names of the seller and purchaser, a brief description of the property sold, and the date of consummation of the sale, together with such other information as the tax commissioner shall prescribe. If the required report of the bulk sale is not made, or if the said taxes, penalties and interest shall not be paid within twenty days after the possession, or the control, or the title of the property, or any part thereof, has passed to the purchaser, or within such further time as the tax commissioner may allow, the purchaser shall be personally liable to pay to the Territory the amount of all taxes, penalties and interest levied or accrued under this Act against the seller or constituting a lien upon such property, together with penalties and interest thereafter accruing, not exceeding, however, the amount of the purchase price, provided, that the issuance of a certificate in the prescribed form shall be a complete defense to such liability of the purchaser. In any case of such liability upon the part of the purchaser a written report thereof shall be made by the purchaser upon the next due date for the payment of gross income taxes. For the purposes of this subsection the "purchase price" shall include money, or the value of any consideration other than money.

Failure to make any report required by this subsection shall constitute a misdemeanor punishable by a fine of not more than one hundred dollars ($100.00). In addition, penalties and interest shall apply to such delinquent taxes if not paid within twenty days after the possession, or the control, or the title of the property, or any part thereof, has passed to the purchaser, or within such further time as the tax commissioner may allow, whether or not an assessment of the tax has been made or notice of the delinquency given. The purchaser shall have his remedy against the seller for the amount of taxes, penalties or interest paid by him.

(3) A penalty of five per cent of the tax shall be added for any default for thirty days or less and for each succeeding calendar month or fraction thereof elapsing before payment, there shall be added interest of one per cent, which penalty and interest shall be and become a part of the tax and be collected as a part thereof. The additional one per cent interest shall not apply until a ten-day notice of delinquency shall have been sent to the taxpayer. (L. 1935, c. 141, s. 13; R. L. 1935, s. 2025M; am. L. 1939, c. 213, s. 3; am. L. 1941, c. 265, s. 8.)

Section 14. *Collection by suit; injunction.* The tax commissioner may, by himself, or a duly appointed deputy commissioner or assessor, or tax collector, collect taxes due and unpaid under this Act, together with all accrued penalties, by action in assumpsit or other appropriate proceedings in the circuit court of the judicial circuit in which the privilege taxed has been exercised. After delinquency shall have continued

for sixty days, or if any person lawfully required so to do under this Act shall fail to apply for and secure a license as provided by this Act for a period of sixty days after the first date when he was required under this Act to secure the same, the tax commissioner may proceed, by himself or a deputy commissioner or assessor, in the circuit court of the judicial circuit in which the privilege taxed or taxable has been exercised, to obtain an injunction restraining the further exercise of the privilege until full payment shall have been made of all taxes and penalties and interest due under this Act, or until such license is secured, or both, as the circumstances of the case may require.

Section 15. *District magistrates; concurrent civil jurisdiction in tax collections.* Except as otherwise specifically provided by this Act, the several district magistrates shall have concurrent jurisdiction with the circuit courts to hear and determine all civil actions at law in assumpsit for the collection and enforcement of collection and payment of all taxes assessed hereunder, irrespective of the amount claimed.

Section 16. *Prerequisite for final settlement of contracts with the Territory or subdivisions thereof.* All territorial, county and city and county officers and agents making contracts on behalf of the Territory of Hawaii or any political subdivision thereof shall withhold payment in the final settlement of such contracts until the receipt of a certificate from the tax commissioner to the effect that all taxes levied or accrued under this Act against the contractor with respect to such contracts have been paid.

Section 17. *Collection of tax.* The tax commissioner for the more effective collection of the tax may file in the office of the registrar of conveyances of the Territory of Hawaii, at Honolulu, a certified copy of an assessment or assessments of taxes under this Act. A certificate so filed shall be recorded in a book provided for the purpose and thereafter shall constitute a lien upon all lands of the taxpayer located in the Territory of Hawaii as against all parties whose interest arose after such recordation. Upon payment of taxes delinquent under this Act the lien of which shall have been recorded the tax commissioner shall certify in duplicate the fact and amount of payment, and the balance due, if any, and shall forward the certificates, one to the taxpayer and one to the said registrar. The registrar shall record the certificate in the book in which releases are recorded, without payment of any additional fee. From the date that such a certificate is admitted to record the land of the taxpayer in the Territory of Hawaii shall be free from any lien for taxes under this Act accrued to the date that the certificate was issued. (L. 1935, c. 141, s. 17; am. L. 1941, c. 265, s. 9.)

Section 18. *Collection by distraint.* The tax commissioner may distrain upon any goods, chattels or intangibles represented by negotiable evidences of indebtedness, of any taxpayer delinquent under this Act for the amount of all taxes and penalties accrued and unpaid hereunder. The commissioner may require the assistance of the high sheriff or the sheriff of any county or city and county in which such sheriff is an

officer. A sheriff so collecting taxes due hereunder shall be entitled to compensation in the amount of all penalties collected over and above the principal amount of the tax due, but in no case shall such compensation exceed twenty-five dollars ($25.00). All taxes and penalties so collected shall be reported within ten days after collection to the tax commissioner, who shall prescribe by general regulation the manner of remittance of such funds and of allowing the collecting officer the compensation due him under this section. (L. 1935, c. 141, s. 18; am. L. 1941, c. 265, s. 10.)

Section 19. *Offenses; penalties.* It shall be unlawful for any person to refuse to make the return provided to be made in section 6 of this Act; or to make any false or fraudulent return or false statement in any return, with intent to defraud the Territory or to evade the payment of the tax, or any part thereof, imposed by this Act; or for any person to aid or abet another in any attempt to evade the payment of the tax or any part thereof, imposed by this Act; or for the president, vice-president, secretary or treasurer of any corporation to make or permit to be made for any corporation or association any false return, or any false statement in any return required by this Act, with the intention to evade the payment of any tax hereunder. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for a period not exceeding one year, or punished by both fine and imprisonment, at the discretion of the court, with-

in the limitation aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return, or any return containing any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law. Any corporation for which a false return, or a return containing a false statement, as aforesaid, shall be made, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000.00).

Section 20. *Administration and enforcement by tax commissioner.* (1) The administration of this Act is vested in and shall be exercised by the tax commissioner who shall prescribe forms and reasonable rules of procedure in conformity with this Act for the making of returns and for the ascertainment, assessment and collection of the taxes imposed hereunder. Such forms and rules when prescribed by the tax commissioner and printed and published in the manner provided by law shall have the force and effect of law. The enforcement of any of the provisions of this Act in any of the courts of the Territory shall be under the exclusive jurisdiction of the tax commissioner, who shall require the assistance of the attorney general of the Territory, and the city and county attorney and the respective county attorneys of the city and county, or of the counties where suit is brought; but said attorneys shall receive no fees or compensation for services rendered in enforcing this Act in addition to the respective salaries paid by law to such attorneys.

(2) The tax commissioner of the territory and the several deputy tax commissioners, divisional assessors, assistant assessors and other assistants, and tax collectors appointed by the tax commissioner, shall have, in addition to all of the duties and powers herein respectively prescribed or granted, all the duties and powers respectively prescribed or granted by the existing or future tax laws of the Territory so far as the same may be applicable to the administration of the within Act and are not contrary to the express provisions hereof.

Section 21. *Licenses; penalty for failure to secure.* Any person who shall have a gross income or gross proceeds of sales upon which a privilege tax is imposed by this Act, as a condition precedent to engaging or continuing in such business, shall in writing apply for and obtain from the tax commissioner, upon payment of the sum of one dollar ($1.00) a license to engage in and to conduct such business for the current tax year, upon condition that he shall pay the taxes accruing to the Territory under the provisions of this Act, and he shall thereby be duly licensed to engage in and conduct such business. Said license shall be renewed annually and shall expire on the thirty-first day of December next succeeding the date of its issuance. Licenses and applications therefor shall be in such form as the commissioner shall prescribe, except that where the licensee is engaged in two or more forms of business of different classification, the license shall so state on its face. Any person who may lawfully be required by the Territory, and who is required

by this Act, to secure a license as a condition precedent to engaging or continuing in any business subject to taxation under this Act, who shall engage or continue in such business without securing such license in conformity with this Act, shall be guilty of a misdemeanor; and any director, president, secretary or treasurer of a corporation who permits, aids or abets such corporation to engage or continue in business without securing a license in conformity with this Act, shall likewise be guilty of a misdemeanor; the penalty for such misdemeanor shall be that prescribed by section 19 for individuals, corporations or officers of corporations, as the case may be, for violation of said section 19.

Section 22. *Records to be kept; examination.* It shall be the duty of every taxpayer to keep in the English language and preserve for a period of five years suitable records of gross proceeds of sales and gross income, and such other books, records of account and invoices as may be required by the commissioner, and all such books, records and invoices shall be open for examination at any time by the commissioner, or his duly authorized deputy, or by the divisional assessor (or his deputy) in whose office the return, returns and reports of the taxpayer are, or should be, filed under the provisions of this Act. Any person violating the provisions of this section shall be guilty of a misdemeanor; and any director, president, secretary or treasurer of a corporation who permits, aids or abets such corporation to violate the provisions of this section shall likewise be guilty of a misdemeanor; the

penalty for such misdemeanor shall be that prescribed by section 19 for individuals, corporations or officers of corporations, as the case may be, for violation of said section 19. (L. 1935, c. 141, s. 22; am. L. 1937, c. 202, s. 2; am. L. 1943, c. 140, s. 1.)

Section 22-A. *Limitation period for assessment, levy, collection, or refunding of taxes.* (1) *General rule.* The amount of excise taxes imposed by this Act shall be assessed or levied within five years after the annual return was filed and no proceeding in court without assessment for the collection of any such taxes shall be begun after the expiration of such period.

(2) *Exceptions; fraudulent return or no return.* In the case of a false or fraudulent return with intent to evade tax, or of a failure to file the annual return, the tax may be assessed or levied at any time; provided, however, that in the case of a return claimed to be false or fraudulent with intent to evade tax, the determination as to such claim must first be made by a judge of the circuit court as provided in section 2050, paragraph 2, of the Revised Laws of Hawaii 1935, which shall apply to the taxes imposed by this Act.

(3) *Extension by agreement.* Where, before the expiration of the period prescribed in subsection (1) of this section, both the tax commissioner and the taxpayer have consented in writing to the assessment or levy of the tax after the date fixed by said subsection (1), the tax may be assessed or levied at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent

agreements in writing made before the expiration of the period previously agreed upon.

(4) *Refunds.* No credit or refund shall be allowed more than five years after the annual return was filed, or in any case of payment of tax without the filing of an annual return, more than five years after such payment of tax, unless a claim for such credit or refund was filed within such period. Provided, that such limitation shall not apply to a credit or refund pursuant to an appeal, provided for by section 9. (L. 1935, c. 141, s. 22; am. L. 1943, c. 140, s. 2.)

Section 23. *Unfair competition; penalty.* No taxpayer shall advertise or hold out to the public in any manner, directly or indirectly, that the tax hereby imposed upon him is not considered as an element in the price to the purchaser. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon the conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00) for each offense.

Section 24. *Constitutionality.* If any section, subsection, sentence, clause or phrase of this Act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Act. The legislature hereby declares that it would have approved this Act and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional or invalid. If the application of any provision of this Act to any person or circum-

stances is held invalid, the application of such provision to other persons or circumstances shall not be affected thereby.

Section 25. *Effective time of Act.* This Act shall take effect on July 1, 1935; provided, however, that, for the exercise, during the period from July 1 to December 31, 1935, of any of the privileges taxed by this Act, every person shall apply for and secure, on or before July 31, 1935, in the manner and under the conditions provided by section 21, a license, and shall pay therefor the sum of one dollar ($1.00); and provided, further, that this Act shall only become effective in the event Senate Bills 24, 40, 145 and 215 become law.